No. 2440

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWIN RICHARDS,
Plaintiff in Error,

vs.

AMERICAN BANK OF ALASKA
(a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR,
on Motion to Dismiss and to the Merits.

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Filed this.....day of April, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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This brief will be divided into *two* parts: *First*, on the *motion* of defendant in error to *dismiss* the writ of error; and *Second*, on the *merits* of the appeal of plaintiff in error.

I.

MOTION TO DISMISS.

This is a *writ of error* sued out by the defendant Edwin Richards, in an action *at law* brought by the American Bank of Alaska against Edward Williams and Edwin Richards as mining co-partners under the name of Richards & Williams (Tr. 4).

The *defendant* in error has moved to dismiss the writ of error upon the ground that the judgment, to reverse which the writ of error was sued out, is a *joint judgment* (Tr. 17-19) against the plaintiff in error Edwin Richards *and* his co-defendant Edward *Williams, co-partners* as Richards & Williams, and against Edwin Richards and Edward Williams as individuals; that the plaintiff in error *alone,* and without petitioning for or obtaining a severance or giving any notice to his co-defendants Williams or the partnership of "Richards & Williams", sued out and had allowed the writ of error and alone assigned errors on said writ; that there was no severance ever requested or ordered to enable or permit *Richards* to sue out and prosecute the writ of error without his co-defendants Williams or the partnership of "Richards & Williams" joining therein; that Rule 63 of the District Court of Alaska to which the writ was sued out, requires such petition for severance *and* notice to the co-defendants; that the *record* here does not nor does the *praecipe* therefor (Tr. 1-2), show any notice to the defendants Williams or the partnership of "Richards & Williams" of or that they refused to join in the writ of error, or that a severance was ever applied for, ordered or obtained; and that this Court has not and never obtained jurisdiction of said cause and judgment upon this writ of error and is without jurisdiction to hear or determine the cause on writ of error (see Typewritten Motion to Dismiss, on file).

The defendant *Williams* defaulted and his default was duly entered (Tr. 17); the case was tried to a jury against the plaintiff in error *Richards* and the following *verdict* was rendered:

> "We, the jury duly impaneled and sworn to hear, try and determine the issues in the above-entitled action, do find in favor of the plaintiff and against the defendants, Edwin Richards *and* Edward Williams, *copartners* as Richards & Williams, and the defendant Edwin Richards, and do find that there is now due and owing and unpaid from said defendants to plaintiff the sum of $3,500 *principal* due on the note sued on in the above-entitled action; together with *no interest* thereon, together with an attorney's fee for plaintiff's attorneys in the sum of $750. Dated, March 26, 1914" (Tr. 18).

Section 325, Alaska Civil Code, provides:

> "A limited partnership may consist of two or more persons who are known and called general partners, and are *jointly and severally liable* as general partners now are by law * * * ."

Judgment (Tr. 17-19) was thereupon entered as follows:

> "1. That the plaintiff have and recover from Edwin Richards *and* Edward Williams, *copartners* as Richards & Williams, and from the defendant Edwin Richards as an individual, the sum of $3,500 together with an attorney's fee the sum of $750.
>
> "2. That plaintiff have and recover from the defendant Edward *Williams,* as an individual, the sum of $3,500 together with interest thereon from February 24, 1911, to date, at the rate of

12% per annum, amounting to $1,312.50, and an attorney's fee in the sum of $750.

"3. That the plaintiff have and recover from the defendants, Edward Williams *and* Edwin Richards, *copartners* as Richards & Williams, and Edwin Richards and Edward Williams, as individuals, the costs of this suit to be taxed by the clerk" (Tr. 19).

The Court will notice that *interest* was *not* allowed by the verdict (Tr. 18) against *Richards,* and the *judgment* against *Richards* does *not* therefore include any *interest,* while *Williams* defaulted and the judgment against *Williams does* include interest (Tr. 19).

Verdict was rendered and filed March 26, 1914 (Tr. 14-16); *new trial* denied April 18, 1914 (Tr. 16) and the *judgment* was dated, signed, served, service admitted, and filed April 20, 1914 (Tr. 20).

The judgment is a *joint* judgment against Edwin *Richards,* this plaintiff in error, *and* Edward Williams *copartners* as Richards & Williams *and* Edwin Richards as an individual, for $3,500 and the attorney's fee of $750; and is a *joint* judgment against Edwin Richards *and* Edward Williams, *copartners* as Richards & Williams, and Edwin Richards and Edward Williams as individuals *for costs;* and against Edward Williams as an individual for $3,500, and *interest* thereon from February 24, 1911, of $1,312.50 and an attorney's fee of $750 (Tr. p. 19). Under Section 325, Civil Code of Alaska, supra, each partner is jointly *and severally* (but *not separately*) liable.

That part of the judgment against Edwin Richards, *as an individual,* does not constitute a separate judgment, but is simply a declaration by the Court *in* the judgment of the legal liability of Richards *as a copartner;* that is, he is, as is each partner, individually liable (jointly with his partner and severally) to creditors of the partnership for the *whole* partnership indebtedness, and has his recourse by contribution from his copartner for all liability satisfied by him in excess of the liability of the partners as between themselves; the whole partnership property *and* the individual partners are in law liable for the *whole* partnership indebtedness, while only the individual interest of each partner *in* the partnership, over and above his liability for debts of the partnership and to his copartner in contribution, is liable for the *personal* debts of the partner; therefore that part of the judgment in this case, which is asserted by plaintiff in error to be a *separate* judgment against him as an individual, amounts to either a declaration by the Court *in* the judgment of Richards' liability for the *whole* principal sum of $3,500 and $750 attorney's fee and costs, and therefore is not improper as part of the judgment and does not change the *joint* character of the judgment, or, it is surplusage and its reversal would not benefit as its presence cannot and does not injure plaintiff in error.

1. The writ of error was by plaintiff in error alone applied for;

2. The record does not show that it was applied for in open Court, but does show it was not, that it was by *petition* in writing served only on defendant in error, and the order allowing the writ expressly states that it was filed "this day" (April 21, 1914, Tr. 290) with assignment of errors;

3. Citation was issued and served May 2, 1914, and cites defendant in error only; and there was no severance or notice or order therefor to permit plaintiff in error to alone sue out the writ of error.

The writ of error was *not* petitioned for or allowed *in open* Court, and there is nothing in this record (nor even in the typewritten documents filed by plaintiff in error on the argument in this Court) showing or suggesting that the plaintiff in error either petitioned for the writ or that the writ was allowed *in open* Court; but the contrary clearly appears from the record, thus: admission of *service* of the *"petition"* for writ of error is admitted by opposing counsel (Tr. 289); the *"order* allowing writ of error" is *dated* April 21, 1914 (Tr. 290), and expressly recites: "The answering defendant Edwin Richards, plaintiff in error, having *this day filed his petition* for writ of error * * * together with an assignment of errors" (Tr. 289).

The writ of error was itself *issued* May 2, 1914, and contains upon its face: "The foregoing writ is hereby allowed. F. E. Fuller, Judge" (Tr. 293), and was served the same day; the *citation* was issued and served the same day, and cites *only* the defendant in error here (Tr. 294-295).

This judgment being *at law,* could be reviewed by *writ* of error only and *not* by appeal, *citation* was necessary, and notice of a writ of error even if given in open Court is not equivalent of citation and the citation issued names and cites only the defendant in error (Tr. 294).

If this writ of error (not an appeal taken) was applied for and allowed in *open* Court, the plaintiff in error could easily have obtained and filed here the *certificate* of the clerk of that Court showing that fact, as it does *not* appear in the record; and even then a citation is necessary on writ of error and was issued and is in the record, and the citation cites only the defendant in error (Tr. 294).

In U. S. v. Phillips, 121 U. S. 254; 30 L. Ed. 914, the Supreme Court by Chief Justice Waite, said:

> "Notice of a writ of error, given in open Court at the same term the judgment is rendered, is not the equivalent of the citation required by Section 999, Revised Statutes. In this respect writs of error *differ* from appeals taken in open Court. The writ of error is dismissed."

Rule 63, of the District Court of the Territory of Alaska, expressly provides:

> "Rule 63. One Appellant from Joint Decree. —In cases where there are two or more parties bound by a joint decree, whether they be complainants or defendants, and an appeal or writ of error is sought, *all* the complainants or all the defendants, as the case may be, *must join* in taking the appeal unless a severance has been allowed. If one or more of the parties bound

> by a joint decree desire to take an appeal or writ of error for the protection of his interests, and the others bound with him will not unite in such appeal or writ of error, then a petition setting forth the facts may be filed in this Court, notice of the hearing thereof given to the parties refusing to appeal, and if upon the hearing it appears that the named parties refuse to unite in an appeal or writ of error, an order may be made granting the right of appeal or writ of error to the petitioner and barring the other parties from such rights, such order being for the benefit of the adversary party and to protect him from more than one appeal or writ of error from the same decree'' *(Motion* papers on file—Certified copy of Rule is thereto attached).

The clerk of that Court also certifies no severance was ever requested nor any notice thereof given.

The liability of partners is *joint,* in the absence of statute.

30 Cyc., pp. 520, 533, 534.

Section 325, Civil Code of Alaska, makes partners *jointly and severally* liable, as it expressly declares "general partners now are by law".

In Copeland v. Waldron, 133 Fed. 217, this Court, *Hawley,* District Judge, rendering the opinion, *Gilbert* and *Ross,* Circuit Judges, concurring, has so clearly and fully covered the several phases of this motion to dismiss the writ of error, that we quote the entire decision:

> "The motions herein made will be considered together. Appellants admit that the decree appealed from is joint, and that a joint decree

should be appealed from by all, or severance made; that the fact that Pirie did not appear in the lower court furnishes no excuse for appellants leaving him out on the appeal; and that this court had the power to dismiss the appeal for want of his presence. But appellants claim that the contention of appellee that this court has no power to bring the omitted party in is not correct.

"We are of opinion that the facts of this case bring it within the rule announced by the Supreme Court in Estis v. Trabue, 128 U. S. 225, 229; 9 Sup. Ct. 58; 32 L. Ed. 437. After holding that a writ of error, in which the plaintiff and defendants were designated merely by the name of a firm containing the expression '& Co.,' was not sufficient to give the court jurisdiction, but, inasmuch as the record disclosed the names of the persons composing the firm, allowed the writ to be amended, under section 1005 of the Revised Statutes (U. S. Comp. St. 1901, p. 714), the court said:

" 'But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under section 1005. The judgment is distinctly one against the claimants, and C. F. Robinson and John W. Dillard, their sureties in their "forthcoming bond," jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties or as containing a judgment against the sureties, payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. * * * It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ, or else there

must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered * * * Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case. * * * It will then, of its own motion, dismiss the case, without awaiting the action of a party.'

"This case is directly in point. It is, however, argued that since the rendition of the decision the Supreme Court has changed its ruling, and accepted the views contended for by appellants; and our attention has been called to Inland & Seaboard Coasting Co. v. Tolson, 136 U. S. 572; 10 Sup. Ct. 1063; 34 L. Ed. 539, which it is claimed is 'strikingly illustrative' of their contention. The facts in that case were dissimilar from the case at bar. There Tolson recovered damages in the Supreme Court of the District of Columbia. The Inland & Seaboard Coasting Company was the sole defendant therein, and gave an undertaking with four sureties, and took an appeal to the general term, where the court, in accordance with its rule in such cases, when it affirmed the judgment of the special term, also entered judgment against the sureties in the undertaking. The writ of error, having been sued out without mentioning the sureties, was dismissed. In moving to rescind the judgment of dismissal, the plaintiff in error argued that the judgments of the general term 'were in fact and in law two judgments, and that the sureties were not parties to the tort suit'. The court contented itself by a simple order granting the motion to rescind the dismissal, and allowed the writ of error to be amended so as to include the sureties. We are not prepared to say that in making this order there was necessarily any departure from the rule announced in Estis v.

Trabue, and it is fair to presume that none was intended. Within five months after the decision in the Tolson case the Supreme Court decided Mason v. United States, 136 U. S. 581; 10 Sup. Ct. 1062; 34 L. Ed. 345, where a postmaster and his sureties were sued jointly for a breach of the bond, and he and a part of the sureties appeared and defended, the suit was abated as to one of the sureties, the others made default, and judgment of default was entered against them. The sureties who had appeared and defended the suit sued out a writ of error. A motion was made to amend the writ by adding the omitted parties, and the motion was denied.

"Walton v. Marietta Chair Co., 157 U. S. 342, 346; 15 Sup. Ct. 626; 39 L. Ed. 725, furnishes an illustration of the character of cases where amendments to the writ of error should be allowed under the provisions of section 1005 of the Revised Statutes. They are cases where 'the statement of the title of the action or parties thereto in the writ is defective', or where the defect, whatever it be, 'can be remedied by reference to the accompanying record'. This is also made clear by reference to the language of the statute. This is not a case where the appeal is merely defective in form.

"The truth is that the rule must be determined by the particular facts in each case as they arise. In the present case the record does not, as mentioned in the statement of facts, disclose that James Pirie, who was one of the three parties against whom the suit was brought to recover damages for breach of a joint contract, and against whom judgment was rendered, was in any manner joined in the appeal, or that he was ever notified to join, or severed for failure or refusal to join. These things must appear to give this court jurisdiction of the appeal. As was said by the court in Inglehart v. Stans-

bury, 151 U. S. 68, 72; 14 Sup. Ct. 237; 38 L. Ed. 76:

"'This could only be shown by a summons and severance, or by some equivalent proceeding, such as a request to the other defendants, and their refusal to join in the appeal, or at least a notice to them to appear, and their failure to do so; and this must be evidence upon the record of the court appealed from, in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter.'

"The motion to dismiss is granted, and the motion to amend denied."

In Continental & C. T. & S. Bank v. Corey Bros. Const. Co., 205 Fed. 282, a decree was made awarding first liens, etc. to complainant by the District Court and two only of several defendants appealed. This Court, before *Gilbert, Ross* and *Hunt,* Circuit Judges, said:

"Sale of the property of the Irrigation Company was ordered, unless payment was made by it or by any of the other defendants. Equity of redemption of the defendants was to be forever barred, and terms of sale were prescribed in detail, the purchaser to hold the property free from all liens of all the parties to suit.

"From this decree, rendered December 27, 1912, the Continental & Commercial Trust & Savings Bank and Frank H. Jones, trustees, appealed. Appeal was allowed March 26, 1913. It does not appear that any of the other parties defendant against whom the decree is rendered join in the appeal, or that they or any of them were notified to appear, and that they or any of them had failed to appear, or, if appearing,

had refused to join in the appeal. Such a situation compels us to order a dismissal of the appeal.

"The Supreme Court, in Masterson v. Herndon, 77 U. S. (10 Wall.) 416, 19 L. Ed. 953, held that it was established that, where the decree is joint, all the parties against whom it is rendered must join the appeal, or it will be dismissed. The court said:

" 'We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other; that is, it would enable the court below to execute its decree, so far as it could be executed, on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final, in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested.' Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. 39, 36 L. Ed. 933; Sipperley v. Smith, 155 U. S. 86, 15 Sup. Ct. 15, 39 L. Ed. 79; Loveless v. Ransom, 107 Fed. 626, 46 C. C. A. 515; Provident Life & Trust Co. v. Camden et al., 177 Fed. 854, 101 C. C. A. 68; Ibbs v. Archer, 185 Fed. 37, 107 C. C. A. 141; Grand Island & W. C. R. Co. et al. v. Sweeney, 103 Fed. 342, 43 C. C. A. 255.

"Holding, therefore, that we are without jurisdiction, the appeal will be dismissed."

De Los Angeles v. Maytin, 216 U. S. 598, 601; 54 L. Ed. 632, 634. The Supreme Court, citing Hardee v. Wilson, 146 U. S. 179; 36 L. Ed. 933, said:

> "The defendant, Mrs. Beatrice de Los Angeles, appealed, but, as the other defendants did not join in the appeal, and there was no summons and severance, the appeal must be dismissed."

Hardee v. Wilson, 146 U. S. 179; 36 L. Ed. 933. The Court said:

> "In the case of Masterson v. Herndon, 77 U. S. 416; 19 L. Ed. 953, it was held that, 'It is the established doctrine of this Court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error'."

Citing: Downing v. McCartney, 131 U. S. XCVIII, Appendix; 19 L. Ed. 757. The Court said:

> "In the case of Downing v. McCartney, where the decree below was joint against three complainants, and one only appealed, and there was nothing in the record showing that the other complainants had notice of this appeal, or that they refused to join in it, the appeal was therefore dismissed."

Citing Mason v. U. S., 136 U. S. 541; 34 L. Ed. 541. The Court said this

> "was a case where a postmaster and the sureties on his official bond being sued jointly for a breach of the bond, he and part of the sureties appeared and defended. The suit was abated as to two of the sureties who had died, and the *other* sureties *made default and judgment by default* was entered against them. On the trial a verdict was rendered for the plain-

> tiff, whereupon judgment was entered against the principal and all the sureties for the amount of the verdict. The sureties *who appeared* sued out a writ of error to this judgment, *without joining* the principal or the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as complainants in error, or for a severance of the parties, and it was held that the motion must be denied and the writ of error be dismissed. In Feibelmann v. Packard, 108 U. S. 14; 27 L. Ed. 634, a writ of error was sued out *by one* of two or more joint defendants, without a summons and severance or equivalent proceeding, and was therefore dismissed".

Port v. Schloss Bros. & Co., 149 Fed. 731, was decided by the Circuit Court of Appeals for the Third Circuit, and was against *partners;* one appearing and defending, the other defaulting but appearing as a witness; the defending partner alone, without any severance or notice suing out a writ of error, which the Court dismissed; and the case being so similar to the one now before the Court and the opinion short, we quote it as follows:

> "This is a writ of error to the Circuit Court of the United States for the Western District of Pennsylvania. In that court Schloss and others, citizens of Maryland, brought an action of assumpsit against Clarence A. Port and W. J. Snyder, citizens of Pennsylvania, partners, trading as Port & Snyder, for a merchandise account in excess of $2000. Both defendants were served. Port appeared and defended the suit. Snyder entered no appearance, but was called as a witness. The jury was sworn against both defendants without objection by Port, and after a trial on the merits a verdict

was rendered in favor of the plaintiffs for the full amount of their claim. After entry of judgment against both defendants Port alone sued out this writ of error, then for the first time raising the question that a judgment for default should have been entered against Snyder; that the jury was improperly sworn against both defendants; that the judgment against Snyder was invalid, and therefore there was error in entering judgment against him, Port.

"Before passing on these questions, we are met by a motion of the defendants in error to dismiss this writ. In support thereof it is contended that, there being a joint judgment against both Port and Snyder, a writ of error will not lie unless both join in it. There has been no summons, severance, or sufficient ground for nonjoinder shown. The motion to dismiss is supported by authority. In Feibelman v. Packard, 108 U. S. 14; 1 Sup. Ct. 138; 27 L. Ed. 634, it was said:

" 'Moses Feibelman and George Woelker, as partner, sued the defendants in error to recover damages for the seizure of their partnership goods by Packard, marshal of the United States for the district of Louisiana. A judgment was rendered against them. Their interests in the suit was joint, and the judgment affects them jointly and not separately. Feibelman alone has brought this writ of error, and there has been no summons and severance or other equivalent proceeding. It follows that the writ must be dismissed on the authority of Williams v. Bank of the United States, 11 Wheat. 414, 6 L. Ed. 508; Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953; Simpson v. Greeley, 20 Wall. 152, 22 L. Ed. 338.'

"To the same effect, in addition to the case cited are Estis v. Trabue, 128 U. S. 228, 9 Sup. Ct. 58, 32 L. Ed. 437, and Mason v. United

States, 136 U. S. 582, 10 Sup. Ct. 1062, 34 L. Ed. 345.

"In view of these decisions, the motion to dismiss must prevail."

Hughes, Federal Procedure, 2d Ed., p. 555, says:

"The reason why, *all* the parties must join where the judgment is *joint* is that otherwise the Court could not execute its decree on the parties who refused to join, and such parties might in their turn attempt to review the case also."

The plaintiff in error at the hearing in this Court filed several documents, which he then frankly stated he did not think affected the question or the decision of the motion to dismiss; but, as they were filed, it is proper that we should point out their peculiar features:

1. There is *a certificate* by the clerk of the Alaska District Court purporting to *add* some things to the record, and contradict the record and his own certificate as to others; for instance, to add that the third and last trial of this case took place in March, 1914, that defendant Williams made default, and to *contradict* his own present record, stating "that in said records and files there is *no reference* to such default other than the one contained in the final judgment of April 20, 1914", while the record here under the same clerk's certificate (Tr. 296) shows that the default *is* referred to, counsel asked that the default of Williams be entered *during the trial* (Tr. 244).

2. There is next an execution and its return partially satisfied, but unintelligible beyond these facts: there is absolutely nothing to show any levy or how the marshal came to sell what he did.

3. Next is a "statement and declaration by defendant, Edward Williams". This document purports to be *acknowledged* by Williams before a notary public, but *not sworn* to by Williams; it is unintelligible and contradicts the record now before the Court in nearly everything, in everything that it does state; for instance it refers to a separate judgment against him, Williams (not Richards) for $250, and another for $5562.50, which certainly can have no significance here. The judgment against *Williams* is for $3,500. *Principal* of note, and *interest* from February 24, 1911, and $750 attorney's fees (Tr. 19); while the judgment against *Richards* is only for $3,500 *principal,* and $750 attorney's fees (Tr. 19), as the *verdict* against *Richards* was *without interest* (Tr. 18) with *no interest* thereon. This record shows a judgment against him and plaintiff in error for $3,500, principal of note and $750 counsel fees (Tr. 19). He makes a number of statements that affect no question here, and winds up by asking this Court "to pass upon the merits of the writ of error without any reference to any supposed rights he may have," but he never suggests anywhere, nor does the record, that he was ever notified by Richard's application for the writ of error, or was asked or refused to join in the writ of error with Richards.

We respectfully submit that the writ of error should be dismissed.

II.

THE CASE ON THE MERITS.

The *"statement of the case"* made by the plaintiff in error in the "brief on behalf of plaintiff in error", is not entirely fair, is partial and inaccurate in many respects, and is not satisfactory to the defendant in error; therefore, requesting the indulgence of the Court, we will proceed to state the case as developed at the trial and by the evidence:

Statement of the Facts.

The complaint alleges the American Bank of Alaska (hereinafter styled the Bank) was a corporation; that Edward Williams and Edwin Richards were a mining copartnership, engaged in business in the Iditarod district of the Territory of Alaska, under the firm name and style of Richards & Williams (Tr. 3, 4); that in September, 1910, the Bank at the special instance and request of the defendants loaned defendants $3500, which they promised and agreed to repay, and on February 24, 1911, defendants in consideration thereof made, executed and delivered to the Bank their promissory note wherein they agreed on or before July 1, 1911, to pay the Bank $3500 with interest at 12 per cent per annum, and in case of suit to collect the same to pay such additional sum as the Court

may adjudge reasonable as attorney's fees in such suit; that no part of the principal or interest had been paid; that the Bank was compelled to employ attorneys to sue and recover on said promissory note, and has become liable for a reasonable attorney's fee, and that $750 would be a reasonable sum to be allowed the attorneys for their services in this action (Tr. 4-5); a second count for money overdrawn was subsequently dismissed (Tr. 12).

Williams was served and defaulted and his default was entered (Tr. 244) *before* the end of the trial (and *not* "was never entered until the close of the trial," as the brief, p. 2, states). Richards, the plaintiff in error answered, admitting certain facts as alleged in paragraph 1, on page 1 of the complaint, but denied (by reference to paragraphs and pages) each and every allegation, statement, matter and thing contained in paragraphs 2, 3 and 4, on pages 1 and 2 of the complaint, and as to paragraph 5, page 2, denies he has knowledge or information concerning same sufficient to form a belief (Tr. 8 and 9).

The evidence on the trial was as follows: And we state *first* the evidence of Williams and *second* the evidence of *Richards,* the other evidence following thus:

Williams and Richards had been *intimately* acquainted for 10 or 12 years,—and Williams had worked a good deal for Richards. Early in September, 1910, Williams was on Cache Creek, in the Hot Springs District. He had been working for

Richards that summer. Earlier in that year he had received a letter from John Boulton in Iditarod. Richards and Williams discussed the letter, but Williams did not remember whether he showed him the letter to read (Tr. 22). About the middle of September, 1910, Richards received a telegram from Boulton, dated Kaltog, Alaska, September 12, 1910, reading: "Dick Richards, Hot Springs, Alaska. Send two thousand at once through N. C. Fifty thousand at stake twelve dollars foot. Freeze out game don't fail see letter. Answer John Boulton." Richards got that telegram on Cache Creek. Williams was staying in Richards' cabin at the time. Richards and he had a conversation with reference to the telegram, but the character of the conversation he couldn't just state. They talked the matter over and he thinks Richards knew something about the matter—the contents of the letter Williams had received earlier in the season, and at that time a friend of his was going to the Iditarod and Richards phoned him to look the proposition up, and that night he and Richards discussed it, but he isn't sure. We passed our remarks about him, what kind of a boy he was. Williams always thought him all right and spoke pretty favorably about him. Williams had no money and Richards knew that; he had been working Richards' ground there that summer, and was in debt to Richards at that time. They discussed about Williams going to Iditarod. Nothing definite was agreed upon. The following morning Richards gave Williams a check

for $2,300 and $200 in currency (Tr. 23-25). The conversation and what was agreed upon was that Williams was to go down there and use his own judgment and make a purchase, and to use his own judgment with reference to any transaction, and was supposed to work whatever was purchased. Nothing was said what would be done with the profits from anything purchased (Tr. 25). Between the time that telegram came and the time Williams left Hot Springs with Richards, and after Richards had given him the $2,500 Richards said to Williams: "If there is no confliction with that ground, *we will go stronger than that*" (Tr. 26). This was late in the evening that Richards said this, and I pulled out at 4 o'clock in the morning. Richards hired and paid a man to row Williams to Gibbon, and engaged the boat. I heard something from a fellow named Merrifield who had been there, and Richards told me to go down town to Tofty and see him to find out something about the ground; I saw him and came home and talked the matter over with Richards, that Merrifield told me it looked very favorable, that he had a good thing down there. He had been on the creek. Richards telephoned Williams to Tofty, telling him that if he could get to Gibbon on a small boat he could catch the "Susie" (Tr. 26-29). The money Richards gave Williams, the $2,500, was not borrowed by Williams from Richards. Richards said he was too busy to go himself. Williams caught one of the packets at Gibbon and reached the Iditarod the very latter part of Septem-

ber, 1910; he had exchanged the money for a letter of credit to the N. C., got the money and took it to the Miners & Merchants Bank, where he deposited it in his own name (Tr. 29). Williams then went to the Boulton lay there, went out on the creeks and looked the matter over; he was introduced by Mr. Morgan to Mr. Hurley (president of the American Bank of Alaska (Tr. 158), and told him he wanted to buy a half interest in the Boulton lay or three-fourths of it—in fact, he bought the half first and then the three-fourths for $4,500. Williams had the bill of sale in the *name of Richards & Williams* (Tr. 30-31). After he had seen Hurley he drew out his money and took it down to Hurley; told him he had no power of attorney from Richards and any agreement between Richards and him was verbal, that *Richards was Williams' partner* (Tr. 31). He told Hurley what he figured doing with the money. Boulton had a mortgage for $1,500 on the ground and he had done business with Hurley, and Williams was to assume the mortgage; I asked to borrow $3,500. Williams told Hurley it was Richards' money, and he suggested that he deposit it in the name of Richards & Williams, because if anything happened to him no one could get the money without a good deal of trouble (Tr. 31-33). He opened the account "Richards & Williams" and deposited $2,000 or $2,100 with Hurley's bank at that time. He made the loan and signed a note at that time. This is the note:

"Fairbanks, Alaska, Oct. 6, 1910.

$3,500.

On or before ninety (90) days after date I promise to pay to the order of American Bank of Alaska, at its office in Fairbanks, Alaska, thirty-five hundred no/100 dollars for value received with interest after date at the rate of twelve per cent per annum until paid. Principal and interest payable only in U. S. gold coin, of the present standard of weight and fineness. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest and notice of non-payment thereof, binds himself thereon as a principal, not as a surety, and promises in case suit is instituted to collect the same or any portion thereof, to pay such additional sums as the court may adjudge reasonable as attorney's fees in such suit. (Signed) Richards & Williams, per Ed. Williams."

Note stamped on face in blue ink as follows: Paid Feb. 25, 1911, American Bank of Alaska, Iditarod Branch (Tr. 33-34).

There were considerable debts in connection with the ground. Checks were drawn against the account, signed: "Richards & Williams, per Ed. Williams" (Tr. 36). A bundle of checks similarly signed and drawn was offered in evidence but, on the statement and stipulation of counsel for the plaintiff in error: "When *they* bought the lay from Boulton and the interest from the other two men, Kennedy and Shively, *they* had a lot of debts then, and, instead of paying the money directly to them, he paid their creditors, and these are the checks, and that was the testimony before; but it don't signify anything" (Tr. 37), they were not filed.

October 24, 1910, *Williams* wrote Richards the following letter (Tr. 38-42):

"Flat Creek, Oct. 24th, 1910.

Friend Dick:

You will no doubt think you are never going to hear from me, but conditions with regards to the mail service are rotten, and to try and get a wire to you was out of the question, so I decided to use my own judgment and do the best I possible good and I hope when you have read this letter that its contents will cause you no worry.

I arrived at Twilight City Sept. 27th, and found Jack waiting for me. We left the next day for the Creek to look over the situation. In the first place I got acquainted with two of the owners at Dikeman on their way outside, and I got busy asking questions about the lay. They spoke very favorable of the proposition, telling me to look over the proposition and satisfy myself. They also said they would like to see Jack make money as he was the first one to locate the pay. I made it a point to see all the owners before to find out if they would consent to the transfer of the lease before I commenced talking business to Jack and his partners. As they did not agree to the transfer of Dave Johnson lay to Doc Madden without a consideration of $6,000, which he paid, making a total of $46,000 which he paid for the thousand feet.

I had no difficulty in getting the consent of all the owners. I then commenced looking into Jack's condition of affairs. I discovered nothing of a complicated nature. In fact, Jack had the whole thing in his name. He had mortgaged his half to make a payment which his partners could not meet for $1,500. There was also a great many small debts amounting to about $2,000.

Now, Dick about the ground. It is undoubtedly good ground, yet I think Jack exag-

gerated when he stated $12 to the foot, but the $50,000 stake. I don't think he did, for I honestly believe the ground will yield $150,000. I may be wrong and to make a long story short I purchased (¾) three-quarter interest in it for $6,500. It is a 75 per cent lay 520 feet up and down stream and 1320 feet across.

I must now enlighten you in regards to the way I made the deal. In the first place, the money I had was hardly a starter. Jack had half interest, his two partners the other half. I paid $4,500 for there half, and Jack $2,000 for a quarter. I assumed all the debts of the half and paid them $1,775.75, $887.75 cash and the balance in four months time. Also there share of the debts which amounted to $1225.00, the most of which I have paid. Also the mortgage of $1500 making a total of $4500. I have only paid $500 on the mortgage at the time writing.

I have also paid Jack share of the debts $778. Also $350 in Cash and the balance $872 when we can. Now Dick how I got the money is the hardest part for me to tell. You may be angry, but I did not do it with any selfish motive or trying to take advantage of the kindness you did for me; yet if I had have received you letter, which I got 4 days ago, I don't think I would have bought it, but it was too late.

I deposited the money in the American Bank of Alaska. Mr. Hurley is the manager. I told him the money was yours. He told me in case anything should happen me unless I deposited in yours and my name, you would have some trouble getting it, so I did as he advised, and signed the cheques, Richards & Williams. Now, Dick, I had to have more money. I first goes to the Merchant and Miners Bank and tried to do business with them. He offered to place to my credit dollar for dollar to the amount of $10,000. That is I would deposit $5,000, he

would give me credit for $10,000. I couldn't see my way clear to make that transaction, as he wanted a mortgage on the loan and the owners did not care at that time to agree to mortgaging the lease.

So I goes to the American Bank of Alaska and borrows ($3,500) for 3 months at one percent, with the understanding that it is to be renewed if it is not convenient to pay when due (90) days.

Now, Dick, I had to sign the note Richards & Williams, and I sincerely hope you wont be offended, and I give it to you my word, also Jack's that every dollar we put into the ground purchasing price included, come out of the ground before he get one dollar. It is a proposition you can't loose on. If you don't make $20,000 out of it I will miss my guess.

You say you want to be on the ground yourself and I assure you I want you to come down; in fact, you have got to come as it requires money to do business in this camp. It requires heavy machinery as the top has got to be scraped off 6 or 7 ft. of it. It is from 16 ft. to 18 ft. to bedrock. It is hard ground to sluice. They dump it on to almost a flat apron and use a nozel on it from a two or three inch pump which they keep in the cut sufficient to keep out the water. The ground is all thawed. You will after pump there is lots of water but can't get up high enough to get good tailing room. Wood is very high, it will cost from 12 to 15 a cord on the claim. So you can see why you should here.

I bought a 40 H P boiler from T. Aitken, $2200, $700 down and gave my note for the balance. I did not use your name on the note. It is due the 1st of June. Now, Dick, my money is getting pretty low, that is, I have no money to do business with, such as machinery and wood. That is the reason I want you to come down. I know Dick this proposition places you

in rather an awkward position and I sometimes wish I had never gone into it when I think of the position it places you in. It will mean at least 2 years work on this ground alone, but what of it, Dick, when it is a sure thing?

I have lots of grub for the winter and a nice cabin on the ground and the lumber and boxes on the lay cost about $250. Jack is leaving tomorrow for the upper Iditarod with a prospecting outfit, intending to stay for the winter. He don't want anything to say about the working of the layout. He wants you to take it and do what you like. I will be all alone. Will find a little work to do cutting brush out on the claim and may pick up 30 or 40 cords of wood.

Tom Burns as the lay below—he 1000 ft. 70 per cent Strandberg Brothers ⅔ lay of Ester next, Henderson who used to haul wood on Dome next, G. Friend 60 percent next, Ronan and Monckmon (60 percent) next. Above me is a 500 ft. lay which could be bought. They are asking $15,000 for it. They have been offered $11,000 for it. Then the Gugg, Dave Johnson, D. Madden, T. Aitkens. It is reported Aitkens took out $200,000. Dr. Madden $170,000, the Guggs were hoisting 1000 a day or better so the owners to the ground told me with a small crew. This so you can judge for yourself how this proposition looks to me.

Now, Dick, whatever I have done I hope will meet with your approval, as I want to do what is right by you.

I am in town—have been in for a day or two getting an outfit for Jack and getting the Bill of sale for the ¾, have it made out to you and me, which I hope will be satisfactory.

Mr. Aitken will call on you and explain the conditions in this camp and will enlighten you a good deal.

Tom Williams is over on the Kuskerwin prospecting. Shorty Greggan also. I saw him a

few days ago. He has nothing fat. John Johansa Earn are both hear, not doing any think.

I must now close hoping to hear from you or else see you in the near future.

Sincerely yours,

(Ed. J. Williams),

Flat Creek, Iditarod, Alaska."

Richards wrote Williams on December 8, 1910, in reply to that letter, as follows (Tr. 44-47):

"Tofty, Alaska, Dec. 8th, 1910.

Friend Ed:

Received your registered letter last night, 7th, and other two letters Monday night 5th. I would have answered them on the return mail, only when you address to Hot Springs, the letters to there first. They should be addressed to Tafty from that direction. I was rather surprised on reading your letter. You are going some, I did not see T. Aiken. I heard he went past here 2 weeks ago, so I called him on the phone at Hot Springs. He told me you purchased ½ interest in the lay, and he thought it was good ground, asked me if it would be all right about some money due first of June, so I told him I didn't know a thing about anything, as I had no word whatever. He thought I would have been informed about it and that was all. As I said I was surprised as its been so long since you left I would have knowed something before. First of all, I want to ask you, as you say nothing about it, is that 5.00 or 8.00 ground located on that lay. I never heard it was a yet, neither on that lay above. They surely would buy that as well as Dave Johnson's lay if they could show the goods. I hope you have it there. Regarding coming down there, you know Ed that I paid cash for ground here before you left, and it would be almost impossible for me to leave this place,

unless I was rid of everything I have here, and if I came down there to work ground, I would certainly bring my machinery down. I couldn't go to work and buy machinery there while I have this on hand, and besides I have contracted 300 cords of wood and over, and partly paid for, which means over $2,000. You, Dan and Jack should certainly be able to work that ground. I realize you have put yourself under considerable obligations. What on earth did you make all them due in three and four months, come due in the heart of winter, when there is no possibility to raise a dollar. Regarding that account at the Bank in both our names, that is certainly a mistake. When I gave you a check for the money and you gets a letter of credit on it, my name should not be used at the Bank. I never had the least idea you should assume any obligations beyond what would relieve the situation and what Jack called for at the time, and now when I see Jack gets some of the money himself and takes to the woods. And whatever became of that letter he was sending, never showed up here as yet. Well, now Ed to make this shor, I believe the best way out of this, you should try to get some of them moneyed fellows down there to go in with you. Consider me out of it altogether. Doubtless you should have no trouble in doing business with that kind of ground, and with people there that knows it. I figure I have as much at stake here, although I may have nothing, but it's certainly easier for many of them to leave Hot Springs than me, and also I am having a little anxiety regarding my head. I don't know but there's a head datch or something remaining and am liable to be required to seek medical aid any time, so it wouldn't do for me to be there. There is a mail leaving in the morning and I must take this to Kelly tonight, so I am sending at the earliest possible. I don't know

how long it will be getting there. I realize Ed that you mean all right, and I sincerely hope you will make out all right. When I said I would like to be on the ground myself, I meant it, in so far when it requires so much expense to start, as it seems to there. At the same time. I had no thought of coming down there at the time, as I though you and Jack capable of working any ground if you try, but after I talked with several from there after you left, I did not think you would go into it, as I haven't seen anyone knew that Jack had pay outside of Dolar and half to foot ground and that wouldn't be worth working in that country. So I went ahead contracting obligations here, and must stay with it. If you manipulate another deal, it would be better for you to have the Bill of Sale made over from the old laymen. I sincerely hope you'll make out all right. You are perfect welcome to use that money until you can make it. There is nothing new here. There was a small find made out on a creek near Fish Lake by Tom Lockhead. Gus is down prospecting with Patten. They are getting some prospects. I have my fifth hole near down at mouth of Dalton, but haven't anything as yet. Dick Morris and partners sold out to Howell. Dutch is taking out a dump on the Eureka. Will enclose. Kindly let me know if you make out all right. It seems to me you could easily make some transaction to advantage on that kind of ground. I don't care to go any more. In fact I can't at present and the only way I would do any more would be bringing my plant down. I wouldn't think of buying machinery. With sincerest wishes for success.

Yours, DICK."

Richards had written Williams on September 21, 1910, which Williams received *after* he had made

the loan of $3,500 from the Bank (Tr. 50); and Williams in his letter of October 24, 1910 to Richards, refers to the letter Richards wrote him on September 21, 1910, stating that if Williams had received Richards' first letter only "4 days ago" (Tr. 40), and says: "If I had received your letter, which I got 4 days ago, I don't think I would have bought it, but it was too late" (Tr. 40). It takes the mail *thirty days* to go from Fairbanks, where the letter of Richards was written (Tr. 48) to Iditarod where Williams received it; the mail service was a monthy one (Tr. 50). The following is that letter (Tr. 48-49):

> "Fairbanks, Alaska, Sept. 21st, 1910.
>
> Dear Ed:
>
> Have met people on the Str. coming to Fairbanks, and others after arriving here, and from what I learn, Jack has a promising lay on the Wildcat, but from what they all say, its in a complicated condition. He has partners, several complicated transactions has occurred, and I don't believe its advisable for us to go into it. We couldn't get no interest of any value, and its going to take a good deal more money to handle it than what you have, possibly not now, but in the future he will have to get big machinery to work it, and I don't care to go into it that steep, unless I could be on the ground to attend operations myself, so if you have not interested yourself in it by the time you get these lines, I would advise you to call it off as far as I am concerned. Keep enough money to secure yourself, and return balance to my credit at N. C. Hot Springs, through a draft like you had. I will let you know how things is looking on the lay, if I can get word off on some

Str. after I get back to the Springs.

Johnie Johanson who is bringing this letter is coming down, I believe Jack exagerated his telegram considerable, as regard 12.00 to foot. From all these people I've seen 7.00 is about the best there is anywhere on Flat so far, and as far as his lay is concerned he has nothing located to compare with those figures. But if you have already invested anything in it, I trust you have investigated all those complicated transactions that lay has underwent. Otherwise we will be in lawsuits head over heels. Of course 7.00 ground is good enough for anybody at that, and what I learned from others is not to be depended on. You will learn the facts better right there on the ground far better than I can, so can use your own judgment accordingly. I sincerely hope that Jack has his affairs in far better shape than what I learn. He surely deserves better success after trying so hard. Convey best regards to all the boys, and will try and get a few words off after I get to Springs. Am going back to-morrow.

Wishing you good success, will remain,

Yours,

DICK.

Richards wrote Williams again on December 26, 1910, after he had received Williams' letter of October 24, 1910, as follows (Tr. 51-52):

"Tofty, Hot Springs, Alaska, Dec. 26,/10.

Friend Ed:

Rec'd your note yesterday, Xmas day. Regret to note your discern me to doubt your honesty, which I sure don't or ever meant anything to convey that impression. What bothered me was to have these fellows come after me for the money which I did not know anything about. Regarding your going down there I don't un-

derstand why you would be sorry about. Trust you had my previous letter. Its certainly I am not going to worry anything about, since you put the money into it, go to it and make something out of it. I imagine the proposition must be all right. I would be only too glad to come down there if I was footloose here, but you know my position here as well as me. I don't see how you though I could come down there. It's certainly had no intention of it last fall, or else would go down there then. As you know I looked at the thing to be of mutual advantage to both of us, but I did not calculate on putting more money than what you had; in short Jack got what he asked for in doing that and the extra money you got. I had no intention of going any further, as I took it for granted in getting that amount Jack could carry along, but that don't hurt the proposition any, if its good, its good. I can believe you as well or better than anyone else I talked with regarding it. Remember Ed in all your letters you have said nothing about the prospects in that particular piece of ground, only that you believed there was 150,000$ in it. However its immaterial if there was a million in it, and I hope there is, I have done to much preparations here to leave being you have that much money invested already you should have no trouble in getting some one interested to carry the thing through. Go at it and make something out of it and don't worry about my part. I am sure you havent lost anything that shows around here so far, you have it all to win. Everybody around here things you have done a good thing and that you will make a stake out of it. Gus and Patten is leaving for the Hosiana, Patten having a letter from McGaff advising him to come there. Dick Morris and Co. sold their lay to Howell, $1,000 on bedrock, and went cutting wood. Bob is going to work on Midnight-Sun—

Nothing else new of any importance. With best wishes for success,

Yours,
DICK."

At the end of 90 days when this *note* of October 6, 1910, for $3,500, fell due (Tr. 34), Williams saw Hurley and told him that he had received a letter from Richards and that he wouldn't do any more at present (Tr. 53). After Williams received Richard's letter of December 8, 1910 (Tr. 45), asking him to take someone else into the proposition with him, he started to look around for somebody and got McKenzie and McLellan to go in with him. Williams gave a mortgage as security for the renewal of this note; he paid the interest up to that time on the note (Tr. 53); Williams did not pay the note, but gave a new note and a mortgage (Tr. 54); the note then given is the note in this suit; no further money was received by Williams when he gave this new note (Tr. 57). The mining operations were not a success but were a failure, and Williams left there in September (Tr. 57). The new note is dated July 1, 1911 (Tr. 56). Mr. Hurley took a mortgage on the lay, and it afterwards reverted to the owners because it could not be made a success (Tr. 57). In the early part of September, 1911, before Williams left the Iditarod, Richards sent him the following communication by wireless:

"Fairbanks, Als., Sep. 12, 1911.
Edw. J. Williams, care Ind. Fone Co., Iditarod.
Buy Curran quietly eight below Dome Creek five hundred cash money *American Bank if*

possible sell and come. Answer. Edwin Richards'' (Tr. 58-59).

Williams complied with Richards' request and made the purchase; he had Curran make out a deed and had it deposited in the Miners & Merchants Bank, and wired Richards to send the money and the deed would be withdrawn and forwarded to him; and within a week he started back to this country (Fairbanks) from the Iditarod (Tr. 59); he saw Richards the following spring, as Richards was on the way out when Williams got to Hot Springs (Tr. 60). Williams worked for Dick Richards on Dome Creek for 13 months cooking (Tr. 60); helped Richards build a cabin and worked for him for wages in Hot Springs country from March 1st to September 16, 1909. Richards did not say anything about staking me when he gave me the money (Tr. 72). *Richards told Williams* in the N. C. Company's store that *if things looked good down there that he might go stronger* than he had gone with the $2,500 (Tr. 77). Williams was just given the money and sent down there to use his own judgment (Tr. 80). Williams told Morgan he considered Richards was his partner (Tr. 88). Williams did not have money enough to buy out Shively and Kennedy without that loan—he did not pay them all of the $5,000, but gave checks talked about here to people they owed (Tr. 90-91). Williams told Hurley Richards was his partner, made the deposit in name of Richards & Williams and drew all checks in that name (Tr. 92). Williams

took the bill of sale in the name of Richards & Williams for the ½ and ¾ (Tr. 94). Williams had no recollection of ever receiving a letter from Richards in the tone and with the sentence in it, "I will not be responsible for notes or whatever else you have signed my name to. Let me know as soon as possible if you have revoked the same" (Tr. 96). Williams told Hurley he would write to Richards and tell him what he had done (Tr. 98); and in his letter of October 24, 1910, he did write and tell Richards all about it (Tr. 40). Williams never told Hurley that Richards was dissatisfied and denied his right to sign Richards' name (Tr. 100). When Richards did not want to stay in the transaction, Williams told Hurley he would have to get some other partner in (Tr. 101). Williams never received a letter from Richards saying he would not be responsible for any note he signed (Tr. 115-116). The phone at Hot Springs was registered as Richards & Williams (Tr. 136); and on the index board at Hot Springs, our phone was indexed as "Richards & Williams" (Tr. 137). The bill of sale which was signed by Richards and Williams, and which Williams had had prepared and send to Richards to be signed and sent back to him, was not sent by Williams until April 4, 1911, and was not received back from Richards until after July 1st, 1911 (Tr. 137). There was never any payment of $1,000 made by Williams on the $3,500 note; that sum was paid on the note and mortgage for $1,500 (Tr. 139).

Plaintiff in error *Edwin Richards,* testified:

"I am the answering defendant in this case. My name is Edwin Richards, commonly known as 'Dick Richards'. I have lived in this part of the country since 1905. I was in Dawson before that. I have mined in the upper country and I have done mining in this neighborhood. I have mined on 2 above Dome Creek. In February, 1906, I started in over there. We were there until July, 1908, and then I went down to Hot Springs. *I knew Williams first* in Dawson on Dominion Creek. *He came down here before I did.* He never worked for me in Dawson; *he worked for me on Dome Creek.* I think it was from February until May of the next year, about *fifteen or sixteen months.* He was helping me in general around there when we started in. We were sinking a hole, but when we had men enough, he went to cooking. He was cooking there at my place most of the time. I have seen Boulton over there on Dome too. I wasn't much acquainted with him, but he used to drive points at Maddocks on the next lay, and I used to see him going up to see Williams at the cook house in the morning after he was through work. He was working nights. Once or twice he came to the boiler-house there and passed the time of day with me. I did not have any particular acquaintance with him. I first went down to Hot Springs in August; and then went down again in September, 1908. The second time, when I took the plant down there, Williams was—I don't know whether he went on the same boat, but he spoke about coming down. He said he was coming down. He was going along with me. He wanted to know if there was anything doing down there, and I told him yes, and he came down. I can't say for sure whether he came on the same boat, but he was there when I got there.

I told him he would get a job as soon as I had one when I got down there. He worked for me a few weeks and for awhile in the fall, and during March and until September, 1909. He cooked that summer. I was working a lay over on Cache Creek. That is where my home is and my mining operations. I gave Williams and a man named Johanson a lay in 1909. I went out in the fall and turned the lay over to Williams and Johanson, *Johanson was my old partner on Dome* and they both wanted to take it over when I went out, to work that winter, so I turned the plant, and stuff I had there in the mess-house, wood and everything over to them and left them a little credit at Morrison's besides, to help them to start. Neither one of them had much. Williams had a little more than Johanson had at the time. They worked that lay for pretty near a year; I think they quit about August, 1910. The results were bad. That is, they hadn't made anything themselves, and they had been working hard there, and they were in debt when they got through. There was something between six and seven hundred dollars still owing to me. Then there were some other debts left around besides. They quit the lay. I returned in the spring of 1910, about the 2d or 3d of April. I was over on Cache for about two months. I guess in my own place, but I got hurt and went to the hospital, and was in Gibbon a good deal of the time that summer. I was living in the same mess-house and the same place that Williams and Johanson did and had a cabin close by there, adjoining. *We had a telephone there.* The phone was there when I got back from Gibbon. I paid my share so the phone from that time on was a kind of *a partnership phone.* I guess Williams and Johanson paid for it until that time." (Tr. 190-193).

"I was not in partnership with Johanson and Williams, there was no partnership between them and me" (Tr. 193).

"In the spring of 1910, Williams and I had a conversation about Jack Boulton; he told me he had a letter from Boulton, who had a lay down in the Iditarod, a pretty good lay, he thought, on Flat Creek. He *didn't* say a good deal about it. But it was supposed to be a good lay, and *I guessed it was* in a good location from what he said, because the *general reputation* from that part of the country *was good.* I guessed that. Williams told me *some* of it (Tr. 193). I asked Tom Williams who was going there to see what kind of a lay Boulton had. At that time I had a lot of ground on Cache Creek and some of it *I could* go to work on. I had plenty of machinery. After I got back from the hospital in the fall of 1910, I wanted to sink a few prospect holes as it was too early to start tunnelling; some ground there I wanted to work that coming summer and open up in the spring. Just then I was preparing to sink a few prospect holes on some ground there that *I didn't know* whether there was anything in it or not. I owned quite a lot of ground there, some 15 or 20 claims, that is some kind of an interest, some small, some half or a little better" (Tr. 195).

"I received that telegram up at—I happened to be in Howell & Cleveland's mess-house at the time when I heard our ring on the phone—the ring we had down at the other place—so I took it down there, that is, took the message down on a piece of paper there. That was along towards evening. And I stayed a little while, until I went back down to our own mess-house where we stopped, and I don't—at the time I don't think Williams was in the house when I went in. I think he came in a little while afterwards, though, and when he

came in, I showed him this telegram and he read it. And I can't go into very close details on it, but I made this remark, that I didn't think this telegram was meant for me, and asked him if he didn't think it was meant for him. And Williams said he didn't know but it might be. I am telling you the general talk. We might have talked half an hour. Anyway, I said that I wouldn't for my part send any money to anybody on a telegram like that, to Boulton or anybody else. And he—let's see. So, anyway, finally I told Williams that I didn't want to go down or send any money down; if it was meant for me, I didn't want anything to do with it whatever. Then I asked Williams if he would like to go down there, and he said yes, he would like to go down, 'But what is the use? I have not got anything to go down with.' I says, 'Well, if you think you could do yourself any good by going down there I would give you the money to go down.' He thought a minute and then he said he would, being that he knew Jack so well and everything—he thought he could make a good deal, and decided there that he would go that evening. And I intended—the next day I was going to come up to Fairbanks anyway, as I had to get some more machinery, and I was going to leave the next day for Hot Springs, and I left the place about 9 o'clock. (Tr. 196-197).

Williams went to Tofty to see Merrifield, who had come from the Iditarod (Tr. 197).

I gave Williams some currency and also $2,300. The check is dated Sept. 16, 1910. My account at Fairbanks was not enough to cover that check, and I was coming up to make it good. It was evident from the telegram there was something wrong about this Boulton interest, some trouble, and Williams in leaving said he would thoroughly investigate the condition

of this lay before he would put any money into it after he got down there. I just gave him this money to give him a start down there (Tr. 198-200). I staked him to it. He did not say anything about being partners or working mining ground down there or anything after that. I had a little left at that time. *Williams had been along with me a long time* (Tr. 200) and I always tried to help him out and I would like to see him make something. He said that I could depend on him, that he wouldn't put a dollar into that ground unless everything was clear and he could see his way through with the money he had; and besides he says: 'I appreciate your kindness in giving me this money to go down, and I will do the right thing by you.' I never told him that if he needed more when he got down there I would go stronger than I had already (Tr. 200). Nothing was said of giving him more money. If the $2,000 was not sufficient to go into that deal that he would not go into it. The $500 he was to use for his fare, clothing and grub. He left on the boat and I on the steamer for Fairbanks. On the boat I met some people who had a better idea of what the conditions were in the Iditarod. I never knew before the conditions there, and I wrote that letter of September 16th (Tr. 201). I never had any correspondence with or any notice from the bank, or Williams or anyone else up to September, 1911, about this note of February 24, 1911. I had some talk about or had some letters with reference to the note made out in October, 1910; I had written several letters with reference to that note, and two of them are here, already in evidence (Tr. 203). There was another letter of December 16, 1910, by me to Williams about his having signed my name to that note of October 6, 1910. I know I put this sentence in that letter: 'I will not be re-

sponsible for any notes or whatever else you may have signed my name to. Now let me know as soon as possible if you have revoked the same.' Williams sent me a deed to sign and swear to it and I did so and sent it back to him (Tr. 204). I received the first letter about December 5 or 6, informing me that he had taken an assignment of the lay in both our names (Tr. 204-205). I believe it was December 28, 1911, that I found out from the bank that Williams had signed up a note in my name of February 24, 1911. I received that letter in San Francisco; that letter was from the bank here (Tr. 206). I got Williams' letter of October 24, 1910 (Tr. 38-43), on the 7th or 8th of December, 1910, and I remember the information in that letter, and I replied (Tr. 44-47) on December 8, 1910 (Tr. 209). When I came back from San Francisco in 1912, I stopped 4 or 5 days in Fairbanks. I was then doing business with the American Bank of Alaska and for nearly a year before I saw Mr. Hurley at that time in the bank. I went to the bank there, and told him the same thing as I told him in the letter from San Francisco —that I didn't see why he could expect me to pay the note; that I had nothing to do with it, and never authorized anybody to sign it, or anything of the sort—Williams, or anybody else—I told him that I never had a partner or anything in the Iditarod, Williams or anybody else (Tr. 211). I was sued about the 4th or 5th of September, 1912. I knew Morgan on Dome Creek. I knew he was in the Iditarod, that he had gone down there; I can't say when (Tr. 212-213). I never said to Egler what he testified to, that I was $6,000 in that; I might have had conversations with Egler along that line. I never had that money involved in the thing down there at all. I was in Tofty or Sullivan Creek in 1911 (Tr. 214-215).

Boulton was just an acquaintance of mine. I couldn't be sure, but I think *there was a telegram* sent to Boulton about September 16 or 17, 1910, that Williams was on his way down with money from Hot Springs; but *I don't know whether I* sent or Williams sent it (Tr. 215). I gave Williams this money and told him to go down there and do as he pleased with it—*Williams was to use his own judgment.* He decided to go; I asked him if he would like to go down, and arrangements were made, and I, of course, gave him—we had some talk, and he got the money and went down; and he was to use his own judgment, of course (Tr. 216). I told him to use his own judgment; he said he would inquire into the matter and see that it was all right before he put it in; this was after the discussion took place; he was to investigate the matter, and if he thought it was proper for him to go into the thing after he investigated the condition of the lay, that he could put the money into it and carry himself through, and he was going to put it in, otherwise he would not put it in at all, that he wouldn't put a dollar in (Tr. 217). I never said anything about me going further. I got Sam Campbell to take Williams down to Gibbon. I didn't want to see Williams go down to Gibbon alone in a small boat. I hired and paid this man to take him down. Mr. Curtis had a wire that the last boat was going to leave Gibbon the next day and the only way to get there was for Williams to go down in a small boat, and I sent the boat down and had it brought back, and I paid the man's expenses down and back to Hot Springs on the steamer with the boat, in addition to the $2,500 (Tr. 218).

I expected Williams to make good sometime, if he made it. I did not expect any share of the profits of the venture, *only what Williams*

said that he would do the right thing. If he made it, I guessed Williams would do the right thing by me; if he didn't it was all right with me. My idea was he would pay back the money whenever he could make it (Tr. 219). I wrote all the letters that are in evidence here (Tr. 221). If he made anything I at least expected he would pay interest at least. It was all up to him. I didn't stipulate with Williams to pay me anything back no more than I expected to get this money back *and something for the use of it* (Tr. 222).

But I had this understanding at the time as to both of us, as to this trip being *for the mutual advantage of both of us* at the time Williams left Hot Springs. I presume that is correct, and I so testified at the last trial. I could not tell what would be the outcome of it. *I hoped it would be to the advantage of both of us* (Tr. 222).

When Williams' letter came advising me that he had deposited this money in the American Bank of Alaska *and had borrowed on a note signed by yourself and him* the sum of $3,500, *I did not notify the bank* that that proceeding *was not* considered *correct* by me. I had no notification from the bank myself; and *I did not notify the bank* in any manner, in writing or by word of mouth, until January 2, 1912. When I got their first notification on December 28, 1911, I immediately wrote back denying it (Tr. 223). I was in Fairbanks in September, 1911. I didn't know there was anything in the bank against me. *I did business with the bank all that summer* (Tr. 224). After I wrote Williams and received his reply I didn't consider I had anything to do with it. *Williams told me* in his letter of April 4, 1911, that 'I sold the half interest in the lay for just enough cash down to pay the back interest on the note,

$400.' I never knew the note was renewed (Tr. 226). I understood there was a note, that first note (Tr. 227). I received advice from him that he had signed my name to that $3,500 note. I got that advice in a letter (Tr. 229). Egler and I are good friends and are partners in some mining ground around Hot Springs (Tr. 231).

I wrote Williams advising him to be very careful about his deals down there, otherwise *we* will be in lawsuits head over heels. I did not want to see Williams get into lawsuits or get into any trouble whatever; if he did he would be jeopardizing that money I gave, and he would be up against it, and would be calling on me to pull him out (Tr. 232). By *'we', I meant myself—I am interested,* so far as I furnished him with this money. And if Williams gets into trouble and jeopardizes this money, he is going to make a hallo *and call on me* to help him out. I suppose I was included in *'we'—Williams and myself,* so far as this money went. By *'we'* I meant Williams and myself (Tr. 233). I rang up Tom Williams on our telephone; it was not then but was afterwards in the name of *Richards & Williams* (Tr. 234). When Tom Aitken asked me about the note Williams gave him, and I told him I have not heard a thing from Williams. I don't know a thing about it (Tr. 237). I never did hear of that note of February 24, 1911, until I got that notification in San Francisco on December 28, 1911, and on January 2d, 1912. I immediately replied and repudiated that demand for payment of the note, and I did the same thing here in Fairbanks personally to Mr. Hurley, in April, 1912 (Tr. 240). Egler and I are interested in ground together as joint owners, but we are not partners (Tr. 240) in different claims."

The following spring after Williams went to the Iditarod, Richards and Joseph H. Egler had a conversation on Tofty about mining matters. Richards was then mining on Cache Creek and Egler was mining on Tofty. Richards wanted to know if Egler didn't want to take up that proposition in the Iditarod off his hands. Egler asked him what it had cost him and he said, "I am in about $6,000." Egler told him he couldn't handle it (Tr. 149). Richards and Egler are partners in other mining properties, are partners in some ground on Cache Creek and have always been good friends (Tr. 151). Richards said to Egler that he was in about $6,000. Egler and he were then partners (Tr. 153).

C. J. Hurley was president of the American Bank of Alaska, and met Williams on the Iditarod in the fall of 1910. In September, 1910, Thomas Morgan brought Williams to the bank and introduced him to Hurley as a man who would probably want to transact some business with the bank. Shortly after that Williams opened an account with the bank (Tr. 158). He told Hurley that the money he had to open up the account with was given to him by Richards and was Richards' money; that Richards had sent him down there to look up some proposition, to see if he could get into something; that they were partners together (Tr. 160). He asked Hurley's advice how to transact the business, the partnership affairs, and Hurley advised him to open the account in the name of Richards & Williams. He deposited $2,100. After that he applied

for a loan of $3,500 on the understanding that he and Richards were partners in that down there (Tr. 161). A loan of $3,500 was made in the name of Richards & Williams (Tr. 162). Hurley knew Richards' standing and had known him ever since he has been on this camp (Tr. 163). The note for the loan was for 90 days to give Williams time to write up to Richards for the money (Tr. 163). Williams said that when he left Hot Springs Richards gave him $2,500 and that if he got into something that required more money, to let him know and he would send it down to him. That was the reason the note was made for 90 days (Tr. 164). When the note was about to mature or after that—Williams was on Flat Creek all the time—and when Hurley saw him in town he called his attention to the note being past due and Williams said he had not yet heard from Richards and was unable to take it up; next time he saw him, he said he had heard from Richards and Richards could not spare the money at that time, that Richards was in poor health and making arrangements to operate on a large scale at Hot Springs, and that Richards could not come down himself (Tr. 164). Hurley took a *renewal* of this note on February 24, 1911, for $3,500. No money was paid, and the stamp paid was put on only because it was paid by this *renewal* note. There was no cash transaction in connection with it. The "paid" stamp was put on the old note just merely to cancel it, so the bank would not be holding two notes, and the old note was surrendered.

The note in suit is the *renewal* note. The interest was paid at the time the renewal note was given; also took a mortgage on their interest in the lay on Flat Creek (Tr. 165). Williams executed the mortgage in the name of Richards & Williams (Tr. 1667). No part of that note has ever been paid, and the interest is $1,295 to March 24, 1914. The lay covered by the mortgage was closed down in the fall of 1911, and the note was then sent to the American Bank of Fairbanks for collection (Tr. 168-169). Between October 6, 1910 and October 6, 1911, the American Bank of Alaska did not nor did Hurley receive any communication from Richards (Tr. 169). Hurley knew Richards and his financial standing but didn't know Williams and would not lend Williams any money. Williams said Richards sent him down there to become interested in mining, and Dick Richards was his partner, and he got the loan to buy an interest in the Boulton lay on Flat Creek. He said he had sent him down there to become interested in mining interests. That would make him a mining partner (Tr. 172). Hurley inquired of Morgan who knew Richards and Williams, and Morgan said it was his belief that they were partners. No other inquiry could be then made as there was no telegraph station there and it would take two months to telegraph and get a reply; and the loan was made on Mr. Richards' name (Tr. 173). Hurley would not have loaned Williams money on his own name, and the Miners & Merchants Bank wouldn't have loaned him any

money on Richards' name (Tr. 174). Hurley never notified Richards about either note (Tr. 176). There was no agreement to relieve Richards when Hurley took the new note and mortgage; they were taken in the names of Richards & Williams (Tr. 178). Their lay was on a creek where there were valuable mines. Boulton borrowed $1,500 on his half interest in that lay before this loan was made; bank wouldn't loan any more; that was in September, 1910 (Tr. 179). Hurley knew that the assignment of this lay had been taken in the name of Richards & Williams (Tr. 182). Williams did send a bill of sale to Richards and Richards sent it back to Williams, executed; but Hurley had never had anything to do with it and had not agreed to release Richards (Tr. 183). The new firm was called "McKenzie, Williams & Company"; they had been depositing gold dust, as much as $50,000 and drawing checks for their debts (Tr. 187).

Hurley told Richards in Fairbanks, at the bank, in the spring of 1912, when he repudiated the note in suit, that if that was his final decision the bank would sue him (Tr. 245). Hurley told Richards that he was going down to the Iditarod and would see if he could realize anything on that lay if it had not been abandoned and let him know. He subsequently found they had abandoned it in the fall of 1911; that is why suit was delayed until September, 1912, on this note (Tr. 246).

The foregoing is *the evidence* upon which this case was tried to the *jury,* on its *third* trial, resulting in a verdict for the defendant in error.

Argument.

The learned counsel for the plaintiff in error, in their "Brief for Plaintiff in Error," assert *twelve* points for a reversal, *seven* of which attack the *charge* of the Court to the jury, *three* relate to *refusals* to instruct the jury and in *modifying* requested instructions, and the remaining *two* to rulings of the Court refusing to admit in evidence *two* letters, *one* from Williams to Richards, the *other* from Richards to the bank.

The *entire* charge will be found in the transcript, pages 247 to 256.

In McBride vs. Neal, 214 Fed. 966, 968, the Circuit Court of Appeals for the Seventh Circuit, citing a number of cases, said:

> "If assignments of error are to be based upon the legal sufficiency of the evidence to support a verdict, motions to that end must be made at the conclusion of the evidence and exceptions preserved to adverse rulings thereon."

In the case at bar all of the exceptions to the charge fail to state the thing charged or the facts included or excluded in the *part* excepted to which is asserted to be erroneous, and such an exception is bad. In City of Charlotte v. Atlantic B. Co., 228 Fed. 456, 462, the Court said:

> "The rule is too familiar to require the support of citation that, where the charge excepted to includes correct statements of the law with others that are incorrect, the exception is insufficient to sustain an assignment of error."

I.

The learned counsel for plaintiff in error open the "Argument" in their brief with the statement (p. 24) that "the case was tried by plaintiff on the *theory* that while Williams had no authority as a mining partner nor in virtue of any written power of attorney to sign Richards' name to the notes or to any other writings, yet that Williams having executed the note of October 6, 1910, with an understanding that it was to be renewed, if so desired (and of which understanding there is no foundation in fact in the evidence), and Richards having been notified by Williams of the making of the note of October 6, 1910, and never having repudiated the first note *to the bank,* that he was liable on the renewal note notwithstanding he never heard of it until December 28, 1911."

We have already set out the full evidence in the case, wherein it is established by the evidence that he gave Williams $2,500 and hired and paid a boatman to row him out to catch the packet and sent him down to the Iditarod to examine the Boulton lay, use his own judgment and invest the money given him in mining property there and work whatever he purchased, telling Williams: "We will go stronger than that if there are no complications with that ground, and they to be partners therein as Williams testified and as the acts of Richards and Williams showed; that Williams did as Richards had instructed him and after investigation of

the Boulton lay, used his own judgment as Richards had told him to do, negotiated a purchase of and purchased three-quarters of the Boulton lay in the names of himself and Williams as "Richards & Williams"; and not having enough money to pay for what he purchased, obtained the loan of $3,500 from the defendant in error bank to complete the purchase and pay for the mining property purchased by him, giving the bank therefor a note in the name of Richards & Williams, payable in 90 days and dated October 6, 1910; told Hurley of the bank he would immediately notify Richards and on October 24, 1910, Williams *did* notify Richards *fully of all* he had done (Tr. 38-42). In this letter, Williams tells Richards the *whole story,* and especially does he tell Richards:

> "Now Dick, how I got the money is the hardest part for me to tell. You may be angry, but I did not do it with any selfish motive or trying to take advantage of the kindness you did for me; yet, *if I had received your letter,* which I did 4 days ago, *I don't think I would have bought it, but it was too late* (Tr. 39-40).

Williams then says that he went "to the American Bank of Alaska (the defendant in error here) and *borrowed* $3,500 for three months at 1%, *with the understanding that it is to be renewed* if it is not convenient to pay *when due* (90 days)"; that he *signed "the note Richards & Williams";* that

> "It is a proposition *you* can't lose on. *If you don't make* $20,000 out of it I will miss my guess. You say you want to be on the ground

> yourself and I assure you I want you to come down; in fact, you have got to come as it requires money to do business in this camp."

and (Tr. 41):

> "That is the reason I want you to come down. I know, Dick, this proposition *places you* in rather an awkward position and I sometimes wish I had never gone into it when I think of the position it places *you* in";

and (Tr. 42):

> "Now, Dick, whatever I have done I hope will meet with your approval, as I want to do what is right by you."

This *letter* was received by Richards, he admits, explaining and describing *everything* that Williams had done, including the $3,500 borrowed, the *note, signed* "Richards & Williams," and *with the understanding that it is to be renewed* in 90 days if not paid, and yet the learned counsel for plaintiff in opening the "Argument" in their brief say: "And of which *understanding* there is *no* foundation of fact in the evidence" (Brief, p. 24).

Now, what does *Richards* reply, in his letter to Williams of December 8, 1910 (Tr. 44-47)? Does he *repudiate* any act of Williams? Does he *deny any partnership;* does he question Williams' authority to use his name at the bank, or that *he is not* interested in the deal, or that he will *not pay,* etc.? Richards writes:

> "Received your registered letter last night, 7th, and other *two* letters Monday night, 5th. When you address me Hot Springs, the letters

go there first. I was rather surprised on reading your letter. *You are going some.* I did not see T. Aiken. I heard he went past here 2 weeks ago, so I called him on the phone at Hot Springs. He told me you purchased ½ interest in the lay, and he thought it was *good* ground, *asked me* if it would be *all right* about some *money due* first of June, so I told him I didn't know a thing about anything, *as I had no word* whatever. He thought I would have been informed about it and that was all. As I said I was surprised as its been so long since you left I would have knowed something *before.* First of all, I want to ask you as you say nothing about it, is that 5.00 or 8.00 ground located *on that lay* * * * I hope you have it there. Regarding coming down there * * * it would be impossible for me to leave this place, unless I was rid of everything here, and if I came down there to work ground, I would certainly bring my machinery down. * * * *I realize* you have put yourself under considerable obligations. *What on earth did you make all them due in three or four months, come due in the heart of winter, when there is no possibility to raise a dollar?* Regarding that account at the bank *in both our names,* that is certainly *a mistake. When* I gave you a check for the money and you gets a letter of credit on it, my name should not be used at the bank. I never had the least idea you should *assume any obligations beyond what would relieve the situation* and what Jack called for at the time, *and now* when I see Jack gets some of the money and takes to the woods. Well, now Ed, to make this short, I believe the best way out of this, you should *try* and get some of them moneyed fellows *down there* to go in with you. *Consider me out of it altogether.* Doubtless you should have no trouble *in doing* business with that kind of ground, and with people there

> that knows it. *I figure I have as much at stake here, although I may have nothing* * * * and I am having a little *anxiety regarding my head.* I don't know but * * * am liable to be required to seek *medical* aid any time, so it wouldn't do *for me to be there.* There is a mail leaving. * * * I don't know how long it will be getting there. *I realize Ed, you mean all right,* and I sincerely hope you will make out all right. When I said I would like to be on the ground myself, I meant it, in so far when *it requires so much expense to start,* as it seems to there. At the same time I had no thought of coming down there, *at the time,* as I thought *you* and Jack *capable of working any ground* if you try. * * * So, I went ahead contracting obligations here and must stay with it. *If you manipulate another deal,* it would be better to have the bill of sale made over from the old laymen. * * * It seems to me you could easily make some transaction to advantage on that kind of ground. *I don't care to go any more.* In fact I can't at present and the only way *I would do any more* would be bringing my plant down. I wouldn't think of buying machinery" (Tr. 44-47).

This letter was written by *Richards* December 8, 1911, and yet he had *previously* on September 21, 1911, written Williams a letter which Williams did *not* receive until *after* (22 days *after*—Tr. 40) he had borrowed the $3,500 from the bank (Tr. 50); and in this *previous* letter Richards stated he had met people on steamer and writes Williams:

> "Jack has a promising lay on the Wild Cat, but from what they all say, its in a complicated condition. He has partners; several complicated transactions has occurred, and I don't

> believe it advisable *for us* to go into it. *We* couldn't get no interest of any value, and its going to take a good deal more money to handle it than what you have, possibly not now but in the future. * * * And I don't care to go into it that steep, *unless* I could be on the ground to attend operations myself, *so if you have not interested yourself in it by the time you get these lines,* I would *advise* you to call it off *as far as I am concerned.* Keep enough money to secure yourself, *and return balance to my credit* at N. C. Hot Springs, through a draft like you had (Tr. 48-49). * * * *But if you have already invested anything in it,* I trust you have investigated all those complicated transactions that lay has underwent. Otherwise *we* will be in lawsuits head over heels. Of course, $7.00 ground *is good enough* for anybody at that. * * * *You* will learn the facts better right there on the ground far better than I can, *so use your own judgment accordingly''* (Tr. 49).

So that, even in this *previous* letter of September 21, 1910, Richards winds up by again telling Williams that he is on the ground and knows the facts better, and *"So use your own judgment accordingly"* (Tr. 49).

Then the letter of Richards of December 8, 1910, is written, as above quoted in part, *after* he has received Williams' letter of October 24, 1910 (Tr. 44-47), in which Williams reported to Richards fully everything that had been done by him in the Iditarod.

Now, *after* Richards had written Williams these *two* letters of September 21, 1910 (Tr. 48-49), and

December 8, 1910 (Tr. 44-47), and had received between the time of writing them Williams' *long* letter of October 24, 1910 (Tr. 38-43), *Richards again,* on December 26, 1910 (Tr. 51-52), writes Williams:

> "Regret to note you discern me to doubt your honesty, *which I wouldn't* or ever meant anything to convey that impression. What bothered me was to have these fellows come after me for the money which I did not know anything about. * * * Its certainly *I am not going to worry* anything about. *Since you put the money into it, go to it and make something out of it.* I imagine the proposition *must* be all right. I would be only too glad to come down there if I was footloose here, but you know my position here as well as me. * * * *As you know* I looked at *the thing to be of mutual advantage to both of us,* but I did not calculate on putting more money than you had. * * * I *had* no intention of going any further, as I took it for granted in getting that amount Jack could carry along, *but that don't hurt the proposition any, if its good, its good.* I can believe you as well or *better* than anyone else I talked with regarding it. Remember, Ed, in all your letters you have said nothing about the prospects in that particular piece of ground, only that you believed there was $150,000 in it. However, its immaterial if there was a million in it, and I hope there is, I have done too much preparations here to leave being you have that much money invested already you should have no trouble in getting someone interested to carry the thing through. *Go at it and make something out of it, and don't worry about my part*" (Tr. 51-52).

And as late as September 12, 1911 (Tr. 58-59), Richards telegraphed Williams: "Buy Curran

quietly eight below Dome Creek five hundred cash *money American Bank. If possible sell and come.* Answer. Edwin Richards" (Tr. 58-59). Richards admitted that the telephone at his cabin on Cache Creek was under the name of "Richards & Williams" before Williams left for the Iditarod, a partnership phone (Tr. 193; 234-235); Williams, too, so testifies (Tr. 136-137).

Richards also testified at the last trial:

> "Q. But you had this *understanding* at the time as to both of you, as to this trip being for the *mutual advantage* of both of you at the time Williams left Hot Springs. Isn't that correct? A. I presume so.
>
> Q. Wasn't that your testimony at the last trial? A. Yes, sir. I could not tell what would be the outcome of it. I hoped it would be *to the advantage of both of us"* (Tr. 222).

The note sued upon was dated February 24, 1911, and is *a renewal only* of the note of October 6, 1910, which *original note* Richards was fully informed about and *never,* even to this day, repudiated or questioned Williams' authority to execute, neither to the bank, nor to Williams; nor even in this record can testimony of Richards be found denying or questioning the authority of Williams to borrow the $3,500 from the bank and execute the note of "Richards & Williams" therefor on October 6, 1910.

Richards was told by Williams in his letter of October 24, 1910, that this loan of $3,500 had been made by Williams and the note given "with the

understanding that it is to be renewed in 90 days''; he knew Williams would have to execute a *renewal* note in 90 days and it was undoubtedly Richards' legal duty to notify the bank, or be estopped and bound by the execution of the new note.

His only pretenses are that the bank had never notified him and he hadn't *expected* to put in more money than the $2,500 he gave Williams when he sent him down to the Iditarod to make the purchase of the Boulton lay, telling him to use his own judgment; and even *after* Williams had fully and particularly told him in his letter to him of October 24, 1910, about borrowing the money from the bank and signing the note ''Richards & Williams,'' and the *understanding* that it was *to be renewed* in 90 days if it were not then convenient to pay it, he never notified the bank that Williams had even made a mistake in doing so, or that he would not be responsible or pay it, or that he was not liable for the money borrowed or on the note of ''Richards & Williams,'' or question the authority of Williams to make that note, nor did he ever notify the bank or Williams that Williams and he were not partners in that mining property purchased.

The letters of Richards alone establish beyond a doubt that he and Williams were mutually interested in purchasing and working the Boulton lay and that they had that understanding when he sent Williams down there to purchase it; they were partners, they were mining partners in that Boulton lay.

When Richards received Williams' letter of October 26, 1910, telling him that he had borrowed $3,500 from the bank to purchase the Boulton lay, and had executed the note of "Richards & Williams" therefor, and that the understanding was that the note would *be renewed* in 90 days if it were not convenient then to pay it, it was the absolute and unquestioned duty of Richards to notify the bank promptly that Williams and he were not partners, that Williams had no authority from him to borrow money and sign his name to or execute in the name of "Richards & Williams" that note and that he would not be bound thereby or pay the note. Had Richards done so, the bank would not have *renewed* the note and could at once have proceeded against Williams and the Boulton lay for its money, as that lay was then valuable, being worked and paying; but instead of doing so, Richards was himself dealing with the bank during that time, never even mentioned or raised a question concerning the note to the bank, or even to Williams, and *lulled* the bank into the position in which it was when it was compelled to commence this action upon the renewed note.

There was no question raised upon the trial, by objection or ruling that is reviewable here, that there was any *variance* between the pleadings and proof, or that the evidence was not within the issues made by the pleadings, and it is too late now to make such an objection, when Richards and his counsel have the verdict and judgment against

them upon evidence sufficient to sustain both, and with the pleadings *aided by the verdict and judgment* so that, if such issues were necessary, their acquiescence when they should have objected, leaves the pleadings *aided* by the verdict to sustain the judgment.

Nashua S. B. B. v. Anglo-Am. L. Co., 189 U. S. 221, 47 L. ed. 782.

II.

The next contention (pp. 25-33) of the plaintiff in error is that the Court erred in its *charge* to the jury, and the learned counsel select a *part* of that charge, and assert that it *assumes* a state of *facts* and a *theory* not shown by the record or advanced by the plaintiff.

The charge will be found in the transcript at pp. 247-256.

The Court had already stated the *issues* raised by the pleadings (Tr. 247-248), and then states the *contention* of the plaintiff and the *contention* of the defendant (Tr. 248-249).

The record shows that *opening statements* were made to the Court and jury by both sides (Tr. 21), also from counsel's own *exception* to *part* of charge (Tr. 258), and to these *contentions* the Court refers, and they are *not* contained in the record; and the Court states: "On the part of the plaintiff it is *contended*" and "plaintiff further contends"

(Tr. 248-249). "On the part of the defendant Richards it is *contended*" (Tr. 249); and we submit that the absence from the record, the bill of exceptions, prevents counsel asking the Court to review the same.

That these contentions were the contentions of both sides is certainly true, as this record overwhelmingly discloses and it is unnecessary to take the time of the Court to point out a conclusion so self-evident.

The *exception* actually *taken* to this *part* of the charge is: (a) that it is *inaccurate;* (b) that *no* such claim was made or advanced; (c) that no *amount* except $2500 was mentioned; (d) that *nothing* was said about *borrowing* more money, *as indicated by said opening statement;* (e) that it is misleading and confuses the two notes of October 6, 1910, and February 24, 1911 (Tr. 257-258).

This exception is first insufficient, and second, the charge is not subject to it; it refers to "said *opening statement,* and there is *none* in the record; how or in *what* respect it is *inaccurate,* the exception does not state so that the Court might make it accurate; which one or more of *claims* the exception refers to as not having been made or advanced is not stated, and that part of the charge states a number of *contentions;* no *amount* of money is mentioned in the charge, but simply that Richards agreed *to advance* a certain amount of money; this *part* of the charge does *not* say anything was said about borrowing, but simply states that Williams

did (as is admitted) borrow $3500, and this part of the charge clearly refers to *both* notes by their *date* (Tr. 256-257).

The learned counsel state *again* that there is absolutely nothing in the transcript to show that any amount of money but the $2,500 was spoken of and yet Williams testified: "If there is no confliction with that ground, *we will go stronger than that*" (Tr. 26).

It is difficult to understand the argument of counsel against this part of the charge; they seem to argue that the Court is telling the jury what has been *proved* by each side, while the Court is only informing the jury what each side *contends* that the evidence establishes; and it is ridiculous for counsel to argue that on behalf of the bank it was *not contended* that Williams was authorized *to borrow* money, or that there was not a partnership, or any other conclusion of fact or fact that the jury under the evidence could find, or that it could be error for the Court to tell the jury that plaintiff contended this or defendant that; and we are at a loss to know how plaintiff in error could be injured by the Court stating our contentions as to *what* the evidence established.

The Court *immediately* after this part of the charge, stated the *contention* of the plaintiff in error (Tr. 249).

Counsel say *Williams* was the leading witness for plaintiff, but as his evidence shows, he was an *ad-*

versary witness and Richards' personal friend endeavoring to favor Richards all he could; and then counsel quote (pp. 27-28) *their cross-examination* of Williams, as if they had forced him to admit something, when he was answering like a parrot to leading questions: "No sir, No sir, No sir, No, there was not," and to cap the climax his last answer, which they quote thus:

> "A. I can't say we discussed about buying. I was just given the money and sent down there to use my own judgment."

But counsel *do not* state or quote what Williams *did* testify as follows:

> "I was supposed to make a purchase. I was to use my own judgment, in reference to any transaction. If I purchased anything I was to work it I suppose" (Tr. 25). "I remember Mr. Richards saying in the store: 'If there is no confliction with that ground, *we* will go stronger than that" (Tr. 26). "We talked the matter over, the Boulton lay" (Tr. 27). "Q. Did you *borrow* the money from Mr. Richards? A. No, sir" (Tr. 29).

The learned counsel overlooked the fact that the *jury* believed the evidence tending to show (1) that Richards and Williams had an understanding and agreement that Richards, who had money and was at Cache Creek, expecting to go to the hospital on account of trouble with his head and who couldn't go down to the Iditarod where Boulton had a lay which they believed to be good, was having trouble with his partners and offered the opportunity to get his lay, and Williams who had no money;

was a competent miner and could go down, that Richards would put up the money, Williams could go down and they would purchase and together as partners work Boulton's lay; (2) that they did not know how much money was required, but Richards would then advance $2,500. Williams would go down, investigate and with authority to use his own judgment in the purchase, and Richards agreed, if there were no complications and Williams thought the proposition good, that Richards would go stronger than that; (3) that Williams found the Boulton lay good, no complications, but more money necessary to make the purchase; (4) as it was late in the season, would take nearly three months to communicate with Richards, and with Richards' authority to use his own judgment, borrowed the $3,500, gave the note in the partnership name agreeing for a renewal in 90 days, bought three-fourths interest, took the assignment of the lay in the name of Richards & Williams, and immediately and fully wrote Richards, especially telling about the loan and the note and the execution in the name of Richards & Williams; (5) that Williams, while not expecting or possibly intending to go as deep and strong as that and so informing Williams, yet recognized Williams' authority to borrow and give the note, but not anticipating that Williams would consummate the purchase that way, did not repudiate or disavow the loan or the note or Williams' acts, but acquiesced in what had been done while wishing

Williams had not gone in so deep, and continued to retain his interest, but urging Williams to try and dispose of it, to sell out and come home; (6) that Richards ratified the acts of Williams, was estopped to disclaim liability, and should satisfy the obligation that Williams, with ample authority of Richards and for his use and benefit, had incurred to the bank; (7) that Richards urged the sale by Williams and executed and returned to Williams a bill of sale to enable Williams to dispose of the three-fourths interest which he and Williams owned and acquired in part with $3,500 of the bank's money; (8) that Richards should be held liable for and to pay the bank; and finally, that the jury found all the facts and the letters and acts of Richards and Williams against them and in favor of the bank.

There is not a doubt, that had the operations of Williams as shown by the evidence turned out to be successful and that Williams had made $100,000 in the transaction, but any Court would unhesitatingly hold Williams to be liable to account to Richards as his mining partner.

The whole argument of counsel is directed to the conclusion that the *jury* should have found a verdict for the plaintiff in error, instead of for the bank; but that question is not reviewable here; this is a Court of errors, and only reviews rulings of the trial Court occurring during the trial, and presumes everything in favor of and not against the verdict.

The instruction complained of is neither misleading nor erroneous in any respect.

III.

The instruction asserted to be erroneous in point "II," pp. 33-37, of their brief, is subject to the same considerations urged by us to the last point of the learned counsel.

The *exception* actually *taken* to this *part* of the charge is: (a) That the same is *misleading* in that it refers to a *general* partnership between Williams and Richards instead of a *mining* copartnership as set forth in plaintiff's *complaint;* (b) that it is *not* based upon any *evidence* in the case; (c) especially *that* part of it that authorized the jury to inquire whether any agreement between them contemplated the *borrowing* of money for partnership purposes; and (d) whether or not monies borrowed from plaintiff were *used* (*"used"* is not in the instruction) for such purposes (Tr. 258).

The exception is *insufficient* so far as it states the part of the charge to be *misleading,* as it is not stated *how* or in *what* it is misleading, so that the Court could convict its misleading feature as the Court does not say a *general* but a partnership as *alleged* by the plaintiff, and the *allegation* is of a *mining* partnership; and also in so far as it fails to point out what *part* of it is *not,* as admittedly *some* part of it *is,* based upon evidence in the case;

and the evidence in the case for plaintiff in one part is, that when Richards gave Williams the $2300 in check and $300 in currency, he told Williams: "If there is no confliction with that ground, *we will go stronger than that*" (Tr. 26), and "*to use his own judgment*" (Tr. 25, Tr. 216), and his *three* letters (Tr. 44-47; Tr. 48-49; and Tr. 51, 52) to Williams, as well as all of the other acts and statements of both, and Richards' acquiescence in and failure to repudiate the loan or the note or notify the bank thereof either in these letters until after a year and three months (Tr. 222-223).

The Court, in the paragraph of its charge immediately *preceding* this, stated fully and clearly the *contentions* of Richards (Tr. 249).

The instruction here criticized expressly says: "Any partnership agreement *as alleged by the plaintiff* (Tr. 249); and the complaint, as they said in their last criticism, alleges a *mining* partnership, as the Court *had already* charged in opening its charge and stating the issues (Tr. 247).

This argument of counsel is a good illustration of the *vice,* which the Courts constantly frown upon, the taking of *a part* of a charge and treating it alone, when if it be read with the rest of the charge, it is entirely unobjectionable.

Again, each one of the points made against this charge of the Court, goes not to a particular thing in the charge or in the part of the charge, but to a certain part of the charge, some parts of which

excepted portion, they do not question and which are not subject to exception.

Lindley says:

> "A partnership may be formed by verbal agreement to acquire title by location to public mineral lands; but to create a partnership in working mines not even this is necessary."
>
> Lindley on Mines, 3d Ed., Sec. 797, p. 1960.

> "Its existence is a question of fact."
>
> Lindley, Sec. 797, p. 1961.
>
> Shea v. Nilima, 133 Fed. 209, 213.

> "An express agreement to become partners or to share in the profits and losses of mining is not necessary to the formation of a mining partnership."
>
> Lindley, Sec. 797, p. 1960.

But counsel are in error when they suggest *here* that there is a *variance* between issues and proof; that question is not reviewable here in the absence of some request, objection or ruling *on the trial;* and in the absence of such objection, request or ruling the pleading is *aided* here by the verdict; counsel cannot sit by without objection or request for a ruling on the trial where the proof varies from the issue, and then complain in this Court that there is evidence which might support the verdict and judgment, but that there was no issue, that it was outside the issue; had they made the objection the issue could have been made.

It is not necessary that Williams and Richards should have been mining partners to support this

note; had they been general partners and this money borrowed for and used in their partnership, the note is supported; and had they not been partners at all, but merely principal and agent to purchase, with authority to use his own judgment as here, the note would be supported; and where the note is made as here, for a loan made to one who held the relation, whatever it might be, that Williams sustained toward Richards, a loan made as here, with full notice to Richards and no act of disclaimer or repudiation of authority of Williams to make the loan and note, and a ratification by subsequent action based upon such loan and the use of the money so obtained, as the act of Richards giving a bill of sale and urging a sale of mining property purchased and in part paid for with this *borrowed* money, there is authority, estoppel and ratification.

IV.

The instruction asserted to be erroneous in point "III," pp. 37-44, is subject to the discussion and considerations urged to the last two.

This is another *part* of the charge taken from its context, and is incorrectly copied and quoted in the brief, p. 37; see Tr. 249-250.

The *exception* actually *taken* to this *part* of the charge is: (a) That it is *misleading,* but fails to state how or in what so that the Court would be

enabled to remove any misleading feature; (b) *not* based upon any *issue* tendered by the complaint; and (c) or any *evidence* introduced upon the trial (Tr. 259).

In not pointing out in what it is misleading the exception is insufficient; the complaint expressly alleges the loan of $3,500 (Tr. 4); *"such"* partnership refers to *the kind* of partnership, viz: *mining,* which the Court refers to as the "partnership agreement *alleged* by plaintiff" (Tr. 249) in the part of the charge *immediately* preceding this part, and again several times *before* in its charge (Tr. 247; Tr. 248); and as to it not being based upon *any* evidence *introduced* on the trial, the record is full of such evidence, as repeatedly heretofore and hereafter pointed out.

Again, the learned counsel quote Williams' testimony and say he was *forced* to admit on *cross*-examination: this personal friend of Richards and an adversary witness for the bank, being *forced* to admit something *favorable* to Richards is humorous; but unfortunately for the counsel, the jury did not believe Williams or Richards as against their own acts and letters.

Then counsel *again* inadvertently overlook the record facts and make positive statements as to facts not being shown, when a perusal of these wonderful *letters* of Richards and Williams would put them correct and restrain the positiveness of their statement.

For instance, counsel say: "there is *nothing* to show that any *renewal* of the *first* note was ever contemplated *even* between plaintiff and Williams" (Brief, p. 38). We quote the record thus:

> "So I goes to the American Bank of Alaska and borrows $3,500 for 3 months at one per cent, *with the understanding that it is to be renewed* if it is not convenient to pay when due 90 days" (Tr. 40, letter of October 24, 1910).

Counsel quote Williams' testimony on p. 40 of their brief, and inadvertently leave out between two questions and answers, that is between the 4th and 5th questions on page 40, following:

> "Q. *Hurley wanted you* to send down there and have Richards to deed to you so that you could have the full legal title that ¾ interest?
> "A. I *can't say* that Mr. Hurley asked me to do that.
> "Q. You and Hurley agreed that you were to do that?
> "A. Not necessarily, but me" (Tr. 102).

The quotation in the brief, p. 40, is *not as strong* with these few lines from the record interpolated.

Counsel says there was a *dissolution* of the mining partnership by the *intention* of the parties in the letter of December 8, 1910; but there was not, as a perusal of that and Richards' subsequent letters will show, and especially his telegram of September 12, 1911: * * * "If possible sell and come" (Tr. 59).

Until the bill of sale was signed and sent by Richards to Williams, there was certainly *no* disso-

lution of the partnership, and this bill of sale must have been signed and sent by Richards long after April 4, 1911, because Williams' letter of that date to Richards *states* that the bill of sale *is enclosed* (Tr. 124); so that the question of dissolution made by counsel and its effect on this note, cannot exist on this record.

V.

Counsel on page 44 of their brief, question the correctness of another *part* of the charge under their point "IV," p. 44.

The *exception* actually *taken* to this *part* of the charge is: (a) that it is *misleading* without stating wherein it is misleading; (b) is not based upon any *issues* made by the pleadings; (c) is not applicable to *any theory* of the case made by the pleadings; and (d) is not based upon any *evidence* introduced or heard at the trial (Tr. 260).

Admittedy some part of *this* part of the charge is *not* misleading, is based upon issues made by the pleadings, *is* applicable to *some* theory of the case made by the pleadings; and *is* based upon *some* evidence *introduced* or heard at the trial; and that is *all* this exception states. It is clearly *insufficient*, as it points out to the Court *nothing* wherein the charge is not proper, to enable the Court to correct it at the time, and *that* is the *only* purpose of the rule requiring exceptions to the charge.

They say: "It is difficult to point out any one phrase or portion of this instruction as error" (brief, p. 45); and then state: "It is the instruction as a whole that is misleading and vicious."

Their criticisms are again based upon their own statement of the instruction's meaning, first as a *mere part* of an entire charge disconnected from the whole charge, and their again positive but again inaccurate statement that the instruction is not founded upon and that there is *no evidence* in the record justifying it.

Again they mistakenly but positively say:

> "The vice consists in the practical assumption that there was evidence going to show that Richards authorized Williams to borrow money for the so-called partnership. No evidence of any such authorization is attempted to be shown in the record" (Brief, p. 45).

We refer the Court and counsel to the evidence of Williams after having given him $2,500:

> "If there is no confliction with that ground, *we will go stronger than that"* (Tr. 26). "I was supposed to go down there and *use my own judgment.* I was supposed to make a *purchase* and *work* anything I purchased" (Tr. 25). "But *if you have already invested anything* in it, I trust you have investigated all those complications. Otherwise *we* will be in lawsuits head over heels. Of course 7.00 ground is *good* enough for anybody at that, and what I learned from others is *not* to be depended on. *You* will learn the facts right there on the ground far better than I can, *so can use your own judgment accordingly"* (Tr. 49, letter of Richards to Williams, September 21, 1910).

Then Richards received Williams' letter of October 24, 1910 (Tr. 38-43), telling Richards *fully* and particularly *all* about him *borrowing* the $3,500 from the bank and executing *the note* in the name of "Richards & Williams" to get sufficient money *to purchase* the three-fourths of the Boulton lay (Tr. 38-43); and followed by Richards' letter of December 8, 1910, in *answer* to Williams' letter containing his *full* statement of everything he had done. In this letter, Richards opens by saying:

> "I was rather surprised on reading your letter. *You are going some.* I did not see T. Aiken. I telephoned him at Hot Springs. He told me you purchased ½ interest in the lay and *he* thought it was *good* ground, asked me if it would be all right about *some money* due first of June, so I told him I had no word whatever. He thought I would have been informed about it and that was all. As I said, I was surprised as its been so long since you left I would have knowed something before" (Tr. 44).

Richards had previously in this letter said the letter was delayed by going to Hot Springs and *should be addressed* to Tofty from that direction (Tr. 44). This letter continues thus:

> "*I realize* you have put yourself under considerable obligations. *What on earth* did you make *all of them due in three and four months,* come due in the heart of winter, when there is no possibility to raise a dollar. Regarding that account at the bank *in both our names,* that is certainly *a mistake.* When I gave you a check for the money and you gets a letter of credit on it, my name should not be used at the bank. I never had the least idea you should assume

any obligations beyond what would relieve the situation" (Tr. 45). "If you manipulate *another deal*, it would be better for you to have the bill of sale made over from the old laymen" (Tr. 46).

And in Richards' letter to Williams of December 26, 1910 (Tr. 51-52), he writes:

> "*What bothered me* was to have these fellows come after me for the money which I did not know anything about. * * * Its certainly I am not going to *worry* anything about it. *Since you put the money in it, go to it and make something out of it.* * * * As *you know I* looked at the thing *to be of mutual advantage to both of us,* but I did not calculate on putting more money than you had * * * *but that don't hurt* the proposition any, *if its good, its good.* I can believe you as well *and better* than anyone else I talked with regarding it" (Tr. 51).

Richards *admits he never* notified the bank. Richards testified:

> "Q. Now when this letter came back from Williams advising that he had *deposited* this money in the American Bank of Alaska and had *borrowed on a note signed by yourself and him* the sum of $3,500—*did you notify* the bank that that proceeding *wasn't* considered *correct* by yourself?
>
> A. *No, sir, I did not.* I had nothing from the bank myself. I had no notification from the bank.
>
> Q. Did you notify the bank in any manner, in writing, or by word of mouth?
>
> A. *Not until January 2, 1912*" (Tr. 223-224).

VI.

Another *part* of the charge is asserted to be erroneous in their brief, under their point "V," pp. 46-51.

This *part* of the charge is subject to the same suggestions pointed out by us in our former discussion, and is not erroneous.

There can be no question of its correctness under the evidence, and all of the acts and letters of both Richards and Williams.

In Williams' letter of October 24, 1910 (Tr. 38-43), Richards was fully and particularly informed of the borrowing of the $3,500 and of this note and of everything done by Williams, and that the understanding was that it was to be renewed in 90 days (Tr. 40), and he never repudiated or questioned it or any acts of Williams, to the bank, until January 2, 1912 (Tr. 223), one year and about three months, although he was himself doing business with the bank, and on September 12, 1911, telegraphed Williams to get $500 cash from this bank to buy "Curran" on Dome Creek (Tr. 58-59); and in Richards' *lengthy* letter of December 8, 1910 (Tr. 44-47), Richards does not repudiate or deny the act of Williams, *but acquiesces* therein.

Richards was expressly informed by Williams in his letter of October 24, 1910 (Tr. 40):

> "So I goes to the American Bank of Alaska and *borrows* $3,500 for 3 months at one per cent, *with the understanding that it is to be*

renewed if it is not convenient to pay *when due* 90 days" (Tr. 40).

Beyond a possible doubt, the *absolute duty* was imposed upon Richards to notify the bank of his repudiation if he did not acquiesce in and ratify Williams' acts, as Williams was acting either for Richards or both himself and Richards and with Richards' money; he knew, as Williams had told him all about the deposit of the money in and the payments through this bank, and had he notified the bank he would not be liable on or bound for the loan or to pay the note, or that he repudiated the action of Williams or that Williams was not his partner, or that Richards was not interested in the Boulton lay, the bank could have proceeded and undoubtedly would to endeavor *then,* not later when the lay was abandoned, to collect its money. "Possibly $50,000" had been deposited from that Boulton lay in this bank after Richards had been given full notice and information of everything (Tr. 187). And Richards even made a bill of sale to Williams after this in July, 1911 (Tr. 137). Everything looked and was good on that lay until the middle of August, 1911 (Tr. 110).

We do not believe it necessary to extend this already lengthy brief by further trespassing on the time of the Court, on this point.

VII.

Points "VI," pp. 51-56, and "VII," p. 56, of the brief of the learned counsel for plaintiff in

error are fully covered by the evidence and the suggestions made by us in relation to the other portions of the charge which they assert to be erroneous.

The charge was full, fair and based upon the evidence in every instance, and correctly gave the law to the jury.

VIII.

Counsel in their points "VIII," pp. 56-59, "IX," pp. 59-63, and "X," pp. 63-65, of their brief, present contentions that the Court erred in *refusing and modifying* certain instructions requested by them.

The *first two* of these instructions requested by the plaintiff in error *were given,* except portions thereof which stated: "Applying the law as given above," etc., p. 57, p. 59; the *third* requested instruction was *refused;* and there could be no possible error in refusing to give a charge applying the law to a particular state of facts; nor in refusing an instruction containing such an application of the law to a particular state of facts.

The charge of the Court embraces a correct, full and fair statement of the law necessary to enable the jury to apply it to the facts; and no possible injury could or did occur, nor is any pointed out by the learned counsel, to the plaintiff in error from anything in the charge given, nor from anything contained in the parts of the requested instructions refused.

IX.

The learned counsel for plaintiff in error, in their brief, point "XI", pp. 65-68, assert error in the ruling of the Court excluding, on cross-examination, the letter of Williams to Richards, dated June 27, 1911 (Tr. 126-7).

The witness Williams testified that the letter shown him, of June 27, 1911, is in his handwriting and the signature to it was his (Tr. 122).

The defendant in error objected to the letter as irrelevant, incompetent and not cross-examination (Tr. 122).

> "Mr. PRATT. That whole letter ought to go in. If the Court will read it, it will see that it is not in line with his testimony in some respects; *in others it might be.*
>
> "The COURT. Anything in it you claim is contradictory, you know how to put the question.
>
> "Mr. PRATT. Q. I will ask you if it is not true in that letter of yours to Richards of June 27, 1911, you didn't use this language (reads): 'The Guggenheims are in camp. They have options on most of Flat Creek. We let them have an option for $33,000. They also take all machinery and wood at cost price and also pay all running expenses if they take it up, which expires August 1st. They are certainly doing some prospecting. They have in their employment 150 men sinking holes which demonstrated they intend giving it a good test. Should they take it up I will come direct to the Springs and make good'.—Did you write that?
>
> "Mr. MCGOWAN. We object as irrelevant, incompetent and immaterial, not proper cross-examination, and not in any way impeaching

or contradicting the testimony of this witness.

"The COURT. What is the purpose of that?

"Mr. PRATT. It contradicts him.

"The COURT. As I understand counsel, this is offered to contradict the witness, and *I do not see that it contradicts him,* and I do *not* see that it is *proper cross-examination.* The objection will be sustained" (Tr. 123).

The learned counsel do not pretend to point out anything in this question contradicting the witness, and it certainly was not *cross-examination.*

The letter could only be admissible if it contradicted the witness, and then only in case he *denied* writing it, when the fact is he *admitted* writing the letter.

And in any event there is nothing at all in the letter that could possibly help or hurt the case of plaintiff in error, and it was dated June 27, 1911, over *four* months *after* the date of the note sued on, viz.: February 24, 1911 (Tr. 4-5).

It is unnecessary to further discuss this point.

X.

The last point made by counsel, "XII", pp. 68-70, of their brief, asserts error in excluding the letter of Richards dated January 2, 1912, *to the bank* (Tr. 208).

Richards testified: That he found out that Williams had signed the note in suit, of February 24,

1911, in a letter from the bank, which he received on December 28, 1911, in San Francisco, to which place it had been forwarded to him, having been addressed to Hot Springs, and that the letter of January 2, 1912, was written and signed by him (Tr. 206).

The *purpose* of offering this letter was stated by counsel to be that

> *"the minute"* (Tr. 207) "he got notice of this note in suit he repudiated it (he received the Bank letter December 28, 1911 (Tr. 206), and this letter is dated January 2, 1912 (Tr. 206), a few days longer than *the minute*) in this letter to the Bank, and I will show by him that he never heard before in his life that there was such a note.
>
> "The COURT. You cannot prove that in that manner" (Tr. 207).

Richards testified at pages 206, 207, during the same testimony, that he left California about March 20, 1912, went through to Fairbanks, was there four or five days, was doing his banking business in the American Bank of Alaska and for nearly a year before; that he there saw Mr. Hurley and had a conversation with him, thus:

> "I went in the Bank there, and *told him the same thing as I told him in the letter from San Francisco*—that I didn't see why he could expect me to pay the note; that I had nothing to do with it, and never authorized anybody to sign it, or anything of the sort—Williams, or anybody else. I told him Williams or anybody else; that I never had a partner or anything in the Iditarod, Williams or anybody else" (Tr. 211).

So that, while the *letter* of Richards was excluded, Richards himself was allowed to and did immediately testify that he "went to the bank there, and told him the *same* thing as I told him in the letter from San Francisco" (Tr. 211).

It is impossible to see what possible injury could be sustained by the exclusion of the letter when the writer immediately testified to what he wrote in the letter.

This is a sample of the errors assigned for reversal in this case.

But when the *Court* asked counsel *the purpose* of offering the *letter,* counsel stated:

> "The *purpose* of this is to show that *the minute he got notice* of this note in suit *he repudiated* it in this letter to the Bank, and I will show that *he never* heard *before* in his life that there was *such* a note" (Tr. 207).

Now this letter *does not show* a single one of the things counsel informed the Court was *the purpose* of offering it in evidence. How then could there be error in excluding it; and if there was, Richards immediately testified, not to *that purpose,* but to *its contents* (Tr. 211).

In Lauderdale County v. Kittel, 229 Fed. 593, 603, the Court said:

> "We think that this answer covered all the plaintiff in error was entitled to, in view of the fact that there was no other information given the Court as to what was *proposed* to be proved by the witness."

And again, Richards testified: "I had no notification from the bank itself", and he did not notify the bank in any manner, in writing, or by word of mouth, not *until* January 2, 1912 (Tr. 223).

> "Q. That was a year and three or four months afterward?
> "A. When I got their *first* notification on December 28, 1911, I *immediately wrote* back denying it" (Tr. 223).

Richards testified also:

> "Q. Now, when this letter came back from Williams, advising you that he had *deposited* this money in the American Bank of Alaska and had *borrowed on a note signed by yourself and him* the sum of $3,500, did you notify the Bank that *that* proceeding *wasn't* considered correct by yourself?
> "A. *No, sir, I did not.* I had nothing from the Bank myself" (Tr. 223).

Yet the long letter Williams wrote Richards on October 24, 1910 (Tr. 38-43) told Richards, after stating *the deposit* of the money:

> "So I goes to the American Bank of Alaska and *borrows* $3,500 for 3 months at one per cent, with the *understanding that it is to be renewed* if it is not convenient to *pay when due* 90 days" (Tr. 40).

Also tells Richards he "had to sign the note Richards & Williams" (Tr. 40).

We will not pursue this point further in order to answer the argument of counsel, although they do say: "We submit the error of the Court in this respect seems *too plain for argument* and the same

was *vital* to the defendant Richards," etc. (Brief, p. 69).

Counsel state so positively: "There is *nowhere* in the record *any evidence* that Richards ever had any knowledge of this note of February 24, 1911, until", etc.; and, "There is *no contradiction* of this fact" (Brief, p. 69), that we seem to be constantly quoting the above paragraph from William's letter of October 24, 1911, as to the money being *borrowed* "with the understanding that it is *to be renewed*" in 90 days, and that he signed the *note* in the name of "Richards & Williams" (Tr. 40).

How, in the presence of this plainly stated fact and notice to Richards in William's long letter of details, which letter Richards admits he received and answered in his own long letter of December 8, 1910 (Tr. 44-47), how, can these statements be made?

In conclusion, and with our apology to the Court for the burden imposed upon the Court of reading this long brief which we felt our duty required us to present in replying to the assertions by the learned counsel for plaintiff in error of errors committed on the trial, we respectfully submit:

First. That the *motion to dismiss* the writ of error should be granted.

Second. That upon the merits, the trial was without any error tending in any possible way to

prejudice or injure the plaintiff in error, and that the *judgment* should be affirmed.

Dated, San Francisco,
April 19, 1916.

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